FILE COPY.

Supreme Court of the United States.

OCTOBER TERM, 1902.

EX PARTE: IN THE MATTER OF JAMES S. BARTON KEY, PETITIONER.

MOTION FOR LEAVE TO FILE PETITION FOR MANDAMUS TO COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Now comes the petitioner, James S. Barton Key, by his attorneys, and moves the court for leave to file his petition for a writ of mandamus, to be directed to the Court of Appeals of the District of Columbia, requiring that court to take jurisdiction of and to hear and determine his appeal, duly taken to said court pursuant to law, from a judgment of the supreme court of said District rendered against petitioner alone in the suit of W. F. Roberts, plaintiff, *v.* James S. Barton Key and James P. Scott, copartners, defendants.

HENRY P. BLAIR,
FREDERIC D. MCKENNEY,
JOHN SPALDING FLANNERY,
Attorneys for James S. Barton Key.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 13. Original.

Ex parte: In the matter of JAMES S. BARTON KEY, *Petitioner.*

ANSWER OF THE RESPONDENTS.

For answer to the rule served upon them in the above entitled proceedings, to show cause why the writ of mandamus should not be awarded as prayed in the petition therein, these respondents say:

1–6. That they have no personal knowledge as to the matters and things alleged in paragraphs 1 to 6 of the petitioner's petition, other than that a certain duly certified transcript of record in the case of James S. Barton Key, appellant, *vs.* William F. Roberts, appellee, was filed in the Court of Appeals of the District of Columbia on May 14, 1902, and there docketed as cause No. 1220, and aver that for the purposes of these present proceedings only the said transcript of record is material or can be considered, and that said transcript of record shows that the said cause, then entitled William F. Roberts

vs. James S. Barton Key and James P. Scott, originated before Anson S. Taylor, one of the justices of the peace in and for the District of Columbia, who rendered judgment against both defendants for the amount claimed, from which judgment the defendants appealed to the Supreme Court of the District of Columbia, giving an undertaking on appeal with the United States Fidelity and Guaranty Company as surety; that in the said Supreme Court of the District of Columbia the cause was tried before a jury which, under the peremptory instruction of the court, rendered a verdict for the defendant Scott and in favor of the plaintiff against the defendant Key for the amount claimed, upon which verdict judgment was rendered in favor of the plaintiff against the defendant Key and the said surety, jointly, for the amount claimed, with costs, from which said judgment the defendant Key alone, without joining the said surety or procuring a summons and severance, attempted to prosecute an appeal to the Court of Appeals of the District of Columbia, and filed in the office of the clerk of said Court of Appeals the transcript of record aforesaid.

7–8. That thereupon the appellee Roberts filed in the said Court of Appeals a motion to dismiss the said attempted appeal upon two grounds:

> "First. That the appeal is defective in not joining the said United States Fidelity and Guaranty Company as appellant and no proceeding by way of summons and severance having been had.
>
> "Second. That this court has no jurisdiction on appeal from a judgment of the court below in such cases."

That in the matter of a certain other attempted appeal from a judgment of the Supreme Court of the District of Columbia in a certain other cause removed into said Supreme Court of the District of Columbia by appeal from a judgment of one of the then justices of the peace in and for the District of Columbia, and entitled in the said Court of Appeals as *Groff* vs. *Miller*, there was then pending a motion to dismiss upon the

single ground of lack of jurisdiction, and upon consideration thereof these respondents, sitting as the justices of said Court of Appeals, granted the said motion for the reasons stated in their opinion and decision filed in said cause.

And, as the said decision controlled the determination of the second ground of the said Roberts' motion to dismiss in said case of *Key* vs. *Roberts*, the respondents thereupon on June 24, 1902, granted the said motion and entered an order dismissing the appeal of the said Key, and thereafter denied a motion on behalf of said Key to vacate the said order and grant a rehearing.

9. They deny that, in refusing to take jurisdiction of the said appeal of the said Key, they have acted contrary to law or denied to the said Key a substantial right conferred upon him by law; but, on the contrary, aver that the said appeal was properly dismissed.

They deny that the rule of decision by them in said cases of *Groff* vs. *Miller* and *Key* vs. *Roberts* is of far-reaching effect and aver that, on the contrary, the said two cases were the only instances of appeal ever attempted to be taken to the said Court of Appeals from a judgment of the Supreme Court of the District of Columbia in a case pending therein on appeal from a judgment of a justice of the peace, while the Code of the District of Columbia as originally passed was in force; that the appellant in said case of *Groff* vs. *Miller* has acquiesced in said ruling; and that the question of the right of appeal in such cases, under the provisions of the said Code of the District of Columbia as originally passed, cannot arise in any other case, inasmuch as the amendment to the Code passed on June 30, 1902, has repealed Section 82 thereof, leaving Section 226 standing alone, and these respondents have since the said amendment sustained the right of appeal from judgments of the Supreme Court of the District of Columbia in all cases originating before justices of the peace.

And the respondents refer to the certified transcript of the

record in said case of *Key* vs. *Roberts* in the said Court of Appeals (including their opinions and decisions in said case of *Groff* vs. *Miller*), filed with the petition for mandamus herein, and pray that the said transcript of record, including said decisions in *Groff* vs. *Miller*, may be read and considered as part hereof.

In conclusion, these respondents respectfully submit that the present application does not present a case for the issuance of a writ of mandamus for the vacation of a judgment of dismissal of an appeal to an inferior Court of the United States, with direction to reinstate the appeal therein, for want of jurisdiction in the inferior Court, by the Supreme Court of the United States in the exercise of *its appellate jurisdiction*. If the appeal dismissed had been heard on its merits, no appeal to the Supreme Court of the United States would have lain, and therefore there is no ground for the exercise of appellate jurisdiction by the Supreme Court. Upon the principle of the present application, the Supreme Court would be required to exercise general supervisory power, by means of mandamus, over all the inferior Courts of the United States, from the Police Court of this District up to the Circuit Courts of Appeal, wholly irrespective of any ultimate right of appeal or writ of error to this Court, whenever it is alleged that there has been an order or judgment passed in those Courts for the supposed want of jurisdiction.

A mandamus has never been allowed the effect of a writ of error, but that would seem to be the effect of the mandamus if allowed in this case. Your respondents are well aware that by repeated decisions of this Court the rule has been established that this Court has power to issue a mandamus, *in the exercise of its appellate jurisdiction*, and that the writ will lie in a proper case to direct a subordinate Federal Court to decide a pending cause, or to reinstate a cause that has been improperly dismissed for want of jurisdiction. But this power is exercised, as we understand it, in order that this Court may

exercise the jurisdiction of review given by law; to secure to the party his ultimate right of appeal to, and review by, this Court. That was the principle upon which the mandamus was ordered in the case of *Ex parte Bradstreet*, 7 *Pet.*, 647, and which principle has been fully recognized in subsequent cases: *Ins. Co.* vs. *Comstock*, *16 Wall.*, *258*, *270*; *Ex parte Russell*, *15 Wall.*, *664*, *670*; *In re Atlantic City Railroad*, *164 U. S.*, *633*.

We respectfully submit that this application ought to be dismissed.

R. H. ALVEY,
Chief Justice.

M. F. MORRIS,
SETH SHEPARD,
Associate Justices.

Supreme Court of the United States

OCTOBER TERM, 1902.

No......, Original.

EX PARTE: IN THE MATTER OF JAMES S. BARTON KEY, PETITIONER.

Petition for Writ of Mandamus to Require the Court of Appeals of the District of Columbia to Take Jurisdiction of and to Hear and Determine an Appeal to It from a Judgment of the Supreme Court of the District of Columbia Rendered Against Petitioner Alone in the Case of William F. Roberts, Plaintiff, v. James S. Barton Key and James P. Scott, Copartners, Defendants.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, James S. Barton Key, respectfully shows as follows:

1. That on the 5th day of February, 1901, before A. S. Taylor, one of the justices of the peace for the District of Columbia, one William F. Roberts, as plaintiff, commenced an action at law against your petitioner and James P. Scott,

as copartners, to recover the sum of $196.30 alleged to be due to plaintiff from defendants as a partnership debt on account of certain printed matter and stationery furnished for the use of the hotel "Barton," in Washington, D. C. (R., 1).

2. Writ of summons running against J. S. Barton Key and James P. Scott, "copartners," was personally served on both defendants (R., 1, 2,) and the case came on for hearing before the justice of the peace in due course, and on the 3d day of April, A. D. 1901, judgment was rendered in favor of the plaintiff and against the defendants, as copartners, for the amount claimed, with interest and costs.

3. From such judgment the petitioner and his codefendant, said James P. Scott, duly appealed to the supreme court of the District of Columbia, and their appeal having been duly perfected the case was docketed in said supreme court as cause at law No. 44625.

4. On the 23d day of January, 1902, said case, pursuant to existing law, came on for trial *de novo* in the supreme court of the District of Columbia before Mr. Justice Anderson and a jury, and the plaintiff having introduced testimony to sustain the issues joined and having announced his evidence closed, the trial justice, on motion in such behalf made, instructed the jury "that from the undisputed facts in the case there is no partnership" between the defendants Key and Scott, and therefore "to return a verdict in favor of the defendant Scott on that ground" (R., 18).

5. Thereupon counsel for the defendant Key, petitioner here, moved the court to instruct the jury to return a verdict

in favor of said Key also, on the ground that the suit of the plaintiff having been laid against the defendants as copartners, and the court having declared that the proof had failed to establish any partnership relation between them, no legal judgment could be rendered in favor of the plaintiff and against the defendant Key alone in the pending proceedings; but such instruction was refused by the court (R., 17), and, no further testimony being offered by any party, the court instructed the jury as follows:

"In view of the conclusion reached by the court as to the legal effect of the testimony which has been submitted to you, the court instructs you in this case to return a verdict for the defendant Scott and against the defendant Key. The undisputed facts make it proper that that character of verdict should be rendered" (R., 17).

To which instruction counsel for petitioner duly objected and noted an exception on the minutes of the court, and the jury thereupon returned its verdict in favor of the plaintiff and against the defendant Key for the total amount claimed in the declaration (R., 17), and judgment was, on the 28th day of February, 1902, entered pursuant thereto (R., 5).

6. From such judgment your petitioner, Key, on March 7, 1902, in accordance with the law and existing rules of practice, prayed an appeal to the Court of Appeals of the District of Columbia (R., 5) and perfected the same by making a deposit to cover costs in lieu of filing a bond for costs (R., 6), and thereafter duly served citation on the appellee, Roberts, and perfected his appeal by lodging a duly certified transcript of the record in the cause in the clerk's office of the Court of Appeals of the District of Columbia, and the

same was therein duly docketed as cause No. 1220 on the general docket of that court.

7. Subsequently, on motion of said appellee Roberts and against the opposition of your petitioner, said Court of Appeals, on the 24th day of June, 1902, dismissed said appeal and refused to hear the same on the ground that it had no jurisdiction to do so, notwithstanding the fact that there was then in full force in said District of Columbia the following provision of law governing and regulating the jurisdiction of the Court of Appeals of the District of Columbia.

Subchapter IV, THE COURT OF APPEALS:

SECTION 226. *Jurisdiction.*—Any party aggrieved by any final order, judgment, or decree of the supreme court of the District of Columbia, or of any justice thereof, "including any final order or judgment in any case heard on appeal from a justice of the peace," may appeal therefrom to the said Court of Appeals; and upon such appeal the Court of Appeals shall review such order, judgment or decree, and affirm, reverse, or modify the same as shall be just," * * *

8. Said Court of Appeals refused to take jurisdiction to hear and determine said appeal for the reason, as stated in its opinion granting the motion to dismiss (R., 26), that there was "difficulty in reconciling and making consistent section 82 (subchapter III) with the provision contained in section 226 (*supra*), if we adhere strictly to the literal terms employed in the latter section."

Section 82 (Subchapter III, SUPREME COURT OF THE DISTRICT OF COLUMBIA) reads as follows:

"In no case appealed from a justice of the peace shall there be any further appeal from the judgment of the circuit court."

said Court of Appeals further stating (R., 28) in its said opinion that—

"It is difficult to suppose that it was ever the intention of Congress, by the adoption of section 226 of the Code, to give the right of appeal to this court in all cases of appeal from justices of the peace to the supreme court of this District, even though the amount in controversy barely exceeded five dollars. Yet the words employed in the section, if taken literally, would seem to confer the right. Where the demand in controversy exceeds fifty and does not exceed three hundred dollars, the suit therefor may be brought either before a justice of the peace or in the supreme court of the District, and if brought before a justice of the peace, the defendant may remove the case to the supreme court of the District by *certiorari* for trial in the first instance. * * * If the words in section 226, instead of being read as applying to appeals strictly as such from justices of the peace, be read as applying to final orders or judgments in any case heard on return of *certiorari* by or from a justice of the peace, the apparently conflicting provisions of sections 82 and 226 would be made to harmonize and be rendered consistent, the one with the other, and would consist throughout with the general scheme of the statute relating to civil actions brought before justices of the peace, and this, we think, is the fair and rational construction to be placed upon the terms employed in section 226." * * *

9. Within one week after the rendition of such opinion, viz., on June 30, 1902, the Congress repealed section 82 (*supra*) and amended section 226 by striking out thereof the quotation-marks, leaving the words as above quoted; and thereafter petition for a rehearing in the above cause was filed on the ground that the Congress by such amendments had put a legislative construction upon the so-called conflicting provisions of said sections 82 and 226 of the Code;

but such petition was denied (R., 24, 29), the court saying in its opinion (R., 29):

"The Code was adopted as an entirety and as a single legislative act, and no one part or section of it could in reason be said to be the last expression of legislative will. If in the amendatory and repealing act, passed after the appeal was disposed of by this court, congressional construction is to be accepted as to the meaning originally intended by section 226, then the fact that it was deemed necessary to repeal section 82, in order to give force and effect to section 226, it would follow that while both sections remained unrepealed they neutralized and frustrated each other, and neither could be allowed effective operation. This would leave the law as it existed prior to the adoption of the Code in full force, that is to say, without any effective statutory right of appeal to this court, in cases like the present, and that being the case, the appeal taken in this case could not be sustained. In any aspect, therefore, this appeal would have to be dismissed."

9. Petitioner is advised by counsel, and therefore avers, that the Court of Appeals of the District of Columbia, in refusing to take jurisdiction of the appeal in the above-entitled cause, has acted contrary to law, and has denied to your petitioner a substantial right which was conferred upon him and all persons litigants in like or similar position to him; that the course of reasoning adopted and announced by the said court in its opinions above referred to is unsound and violative of settled canons of statutory construction heretofore adopted and declared by this court, and that the rule of decision so announced by said Court of Appeals is of far-reaching effect, and unless reviewed and revised by this court will effectually bar litigants in cases originally brought in justices of the peace courts, and appealed thence to the supreme court of the District of Columbia, from eventually appealing from the judgment of said supreme court

to the Court of Appeals, notwithstanding the plain words of section 226 of the Code expressly conferring such right of appeal in all such cases.

Wherefore your petitioner prays that a writ of mandamus may be issued out of and under the seal of this honorable court, directed to the Court of Appeals of the District of Columbia, and to the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, and the Honorable Martin F. Morris and Seth Shepard, associate justices of said court, commanding and requiring them and each of them—

I. To reinstate the appeal of petitioner in said cause;

II. To proceed to a hearing and determination of the same on its merits;

III. And for such other and further relief in the premises as to this court may seem appropriate and law and justice may require.

J. S. BARTON KEY.

DISTRICT OF COLUMBIA, *ss:*

I, Frederic D. McKenney, being first sworn, do depose and say that I am one of the attorneys for the petitioner, J. S. Barton Key; that I have read the foregoing petition and know the contents thereof, and that the statements of fact therein contained are true to the best of my knowledge, information, and belief.

FREDERIC D. MCKENNEY.

Subscribed and sworn to before me this 6th day of March, A. D. 1903.

[L. S.]

MARTIN S. DECKER,
Notary Public, D. C.

BRIEF IN SUPPORT OF THE APPLICATION FOR A WRIT OF MANDAMUS.

I. MANDAMUS IS THE PROPER REMEDY WHERE A RIGHT OF APPEAL ALLOWED BY LAW IS DENIED.

Where the court below, from a mistaken view of the law as to its jurisdiction, dismisses a case properly cognizable by it, mandamus is the proper remedy to compel it to reinstate the case and proceed to final judgment. A writ of error or appeal does not lie, for the appellate court has nothing to review where the inferior court has not decided the case, but has refused to hear it.

Ex parte Russell, 13 Wall., 664, at p. 670.
Insurance Co. *v.* Comstock, 16 Wall., 258.
Ex parte Parker, 120 U. S., 737, at p. 743.
Ex parte Parker, 131 U. S., 221, at p. 226.
Re Atlantic City R. R., 164 U. S., 635.
Re Hohorst, 150 U. S., 653.
Ex parte Connaway, 178 U. S., 421.

Mandamus lies to compel a court to grant an appeal where the relator is entitled thereto.

Ex parte Jordan, 94 U. S., 248.
Ex parte Zeliner, 9 Wall., 244.
Vigo's case, 21 Wall., 648.
U. S. *v.* Gomez, 3 Wall., 752.
Ex parte South, &c., Alabama R. Co., 95 U. S., 221.

In the case of *Ex parte* Zellner, the Court of Claims, in construing an act of Congress of March 3, 1863, determined that there was no right of appeal from its decision to the Supreme Court of the United States. On an application for writ of mandamus, however, the Supreme Court of the United States determined that there was a right of appeal, under the statute, from the decision of the Court of Claims. A peremptory mandamus was accordingly ordered to be issued.

Vigo's case was to the same effect, a peremptory mandamus having been there issued to compel the Court of Claims to grant the appeal which, under the law as construed by the Supreme Court of the United States, he was entitled to.

II. THE COURT OF APPEALS HAS DENIED PETITIONER A RIGHT OF APPEAL ALLOWED BY LAW.

The act of Congress of March 3, 1901, establishing a code of law for the District of Columbia, contained two irreconcilable provisions touching appeals to the Court of Appeals from judgments of the supreme court of the District of Columbia in cases heard on appeal from justices of the peace.

The two conflicting provisions may, for the sake of clearness, be placed in juxtaposition as follows:

CHAPTER I.

SUBCHAPTER III.

Supreme Court of the District of Columbia.

SEC. 82. In no case appealed from a justice of the peace shall there be any further appeal from the judgment of the circuit court.

SUBCHAPTER IV.

The Court of Appeals.

SEC. 226. *Jurisdiction.*—Any party aggrieved by any final order, judgment, or decree of the Supreme Court of the District of Columbia, or any justice thereof, "including any final order or judgment in any case heard on appeal from a justice of the peace," may appeal therefrom to the said Court of Appeals; and upon such appeal the Court of Appeals shall review such order, judgment, or decree, and affirm, reverse, or modify the same as shall be just, except as provided in the following sections.

We thus have one section of the Code (an earlier one) expressly providing against and another section of the Code (a later one) expressly providing for appeals to the Court of Appeals from the final orders and judgments of the supreme court of the District of Columbia in cases heard on *appeal* from the justices of the peace.

No subsequent section takes away the right of appeal thus expressly and emphatically conferred by section 226, nor does any subsequent section put it on a different footing from appeals from judgments entered in causes commenced originally in the supreme court of the District of Columbia. No stronger language could be employed to indicate the intent of the law-maker. As if to emphasize this intent, the clause relating to appeals in causes begun in a justice's court is included within quotation-marks. In fact, this identical phrase—"INCLUDING ANY FINAL ORDER OR JUDGMENT IN ANY CASE HEARD ON APPEAL FROM A JUSTICE OF THE

PEACE"—was, on March 2, 1901, the day before the final passage of the act, recommended by the Senate Committee on the District of Columbia and adopted by the Senate as in Committee of the Whole as a specific amendment to said section 226 as theretofore drafted (Congressional Record, 1901, p. 3495).

That it was, therefore, the intention of Congress to give an aggrieved party an appeal to the Court of Appeals from a judgment of the supreme court of the District of Columbia in any case heard on *appeal* from a justice of the peace seems quite clear, and the intention thus to be gathered must be the controlling medium by which to construe the act.

"The primary rule of statutory construction is of course to give effect to the intention of the legislature."

Rodgers *v.* U. S., 185 U. S., 83.

The failure of Congress to expressly (rather than by implication) cancel the earlier conflicting section of the Code was manifestly an oversight.

But, aside from the real intention of Congress (which, of course, must receive the greatest weight in the interpretation of a statute) thus evidenced, the jurisdiction of the Court of Appeals under section 226 would seem to be established by the well-settled rule of statutory construction that where provisions of one section are irreconcilable with the provisions of another section, "the last words stand, and others which cannot stand with them go to the ground."

Powers *v.* Barney, 5 Blatchf., 203.

State *v.* Hall, 5 Rich., 120.

Elliott *v.* Lochrane, 1 Kan., 135.

Ryan *v.* State, 5 Neb., 276, 282.

Gibbons *v.* Brittenum, 56 Miss., 232.
Packer *v.* Railroad Co., 19 Pa. St., 211.
Brown *v.* County Commissioners, 21 Pa. St., 37, 42.
Southwark Bank *v.* The Commonwealth, 26 Pa., 380, 382.
Bacon's Abr., tit. Statutes D.
Ex parte Ray & Defoe, 45 Ala., 15.
Harrington *v.* Rochester, 10 Wend., 547, 553.
Commercial Bank *v.* Chambers, 8 Sm. & M., 9.
Quick *v.* Whitewater Township, 77 Ind., 570.
Albertson *v.* State, 9 Neb., 429.
Sams *v.* King, 18 Fla., 557.
Branagan *v.* Dulaney, 8 Colo., 408.
Gee *v.* Thompson, 10 La. Ann., 657.
Peet *v.* Nalle, 30 *id.*, Pt. II, 949.
Hamilton *v.* Buxton, 6 Ark., 24.

In the case of Powers *v.* Barney there was a direct conflict between two sections of an act of Congress of March 2, 1861. The 19th section imposed 10 per cent. ad valorum duty on Peruvian bark. Tne 22d section said that no duty should be charged on Peruvian bark. Judge Nelson said:

"Each party finds an authority for his claim in the same act of Congress. In this difficulty of conflicting claims, I know of no other way of solving it, than by applying the well-settled rule of construction, in the case of two repugnant provisions of the same act, which is, that the last provision shall prevail, as speaking the latest and final intent of the law-makers."

"If the latter part of a statute be repugnant to the former part thereof, it shall stand; and so far as it is repugnant be a repeal of the former part, because it was last agreed to by the makers of the statute."

Bacon's Abr., tit. Statutes D.

"In cases of irreconcilable repugnancy, it is the last part of a statute which is taken to express the intention of the law-maker."

Packer *v.* Railroad Co., 19 Pa. St., 211.

"All the several sections, on the same subject, should be construed together. By being embraced in the Code, they formed into a system on the subject to which they refer, and by the adoption of the Code the legislature has, as it were, laid its hands on them and given them new life and vitality, as a body. For this reason, if for no other, they should be interpreted and construed together, and, if possible, made consistent and in harmony with each other. If, however, this, in any particular case, cannot be done, then the earlier sections, or sections from earlier acts, must be held to be repealed, or so modified as to be in agreement with the later sections."

Ex parte Ray & Defoe, 45 Ala., 15.

"When two statutes are so flatly repugnant that both cannot be executed, and we are obliged to choose between them, the later is always deemed a repeal of the earlier. This rule applies with equal force to a case of absolute and irreconcilable conflict between different sections or parts of the same statute. The last words stand, and others which cannot stand with them go to the ground."

Brown *v.* County Commissioners, 21 Pa. St., 42.

True, there are a few isolated cases which have questioned the soundness of this settled rule; but, aside from the overwhelming current of authority supporting the rule, its foundation in reason and principle would seem to suffice to vindicate its origin and to defend the validity of its continued existence. In the reading of a bill, matter near the close may be presumed to have received the last consideration of the legislature, and, if assented to, constitutes the latest expression of the legislative will.

This honorable court has in a number of cases recognized that, in the absence of an express repeal, the later expression

of the legislative will operates as a repeal of the earlier expression, either where the two expressions are directly repugnant or where the later expression covers the whole subject of the earlier one and embraces new provisions which plainly show that it was intended as a substitute therefor.

U. S. *v.* Tynen, 11 Wall., 88, at p. 92.
Davis *v.* Fairbairn, 3 How., 636.
Norris *v.* Crocker, 13 How., 429.
King *v.* Cornell, 106 U. S., 395, at p. 396.

The plain intent of Congress, as gathered from the history of the matter, and the canons of construction unite in supporting the contention that section 226 of the Code confers upon aggrieved parties the right of appeal to the Court of Appeals from the final orders and judgments of the supreme court of the District in cases heard on appeal from justices of the peace.

The Court of Appeals, however, instead of giving effect to the intent of Congress, has attempted to nullify the same. It declares that while the word "*appealed*," used in section 82, is to be given its usual signification, yet the word "*appeal*," used in section 226, is to be construed otherwise; in other words, that Congress did mean what it said when it denied the right of appeal in section 82, but when in express and direct terms, emphasizing the same by quotation-marks, it granted the right of appeal in section 226, it did not mean what it said.

The ruling of the Court of Appeals that the words "*on appeal*" as used in section 226 are synonymous with "*on certiorari*" is, it is respectfully submitted, wholly unwarranted by anything contained in the Code, and is unsup-

ported by reason or authority. In fact, to construe the clause "INCLUDING ANY FINAL ORDER OR JUDGMENT IN ANY CASE HEARD ON APPEAL FROM A JUSTICE OF THE PEACE," in section 226, as having been intended by Congress to refer to cases brought up to the supreme court of the District of Columbia *by certiorari* in the first instance, without any trial whatever in the justice's court, would be to declare that the clause is superfluous and without meaning or force of its own, for it has never been doubted that an appeal would lie from the judgment of the supreme court in all cases removed into that court by certiorari on the ground of concurrent jurisdiction.

Aside from the clause reading "including any final order or judgment in any case heard on appeal from a justice of the peace" (and prior to the insertion thereof by amendment on the day previous to the passage of the act) section 226 clearly and explicitly gave any aggrieved party a right of appeal to the Court of Appeals from a final order or judgment in any case heard *on certiorari* from a justice of the peace. Omitting said clause from the section, the section would read:

"Any party aggrieved by any final order, judgment, or decree of the supreme court of the District of Columbia, or any justice thereof, may appeal therefrom to the said Court of Appeals; * * * "

It is to be noted that this right of appeal is given from "any final order, judgment, or decree of the supreme court" without restriction or limitation, and the Court of Appeals says in its decision that section 82 reading:

"In no case appealed from a justice of the peace shall there be any further appeal from the judgment of the circuit court."

applies to and affects only cases *appealed* from a justice of the peace, and has no relation whatever to cases removed by *certiorari* from a justice of the peace.

As, therefore, section 226 of the Code, prior to the insertion therein of the words "including any final order or judgment in any case heard on appeal from a justice of the peace," had already conferred the right of appeal in cases removed from the justice's court by certiorari, it is difficult to understand why it was necessary to insert such words, if not to confer the right of appeal in cases heard on appeal from a justice of the peace.

The intention of Congress in this regard is furthermore clearly indicated in recent amendments to the Code (approved June 30, 1902), whereby the repugnant section 82 is expressly repealed and section 226 is retained in full force, the quotation-marks around the clause "including any final order or judgment in any case heard on appeal from a justice of the peace" being also removed, because no longer necessary, in view of the cancellation of section 82. This may well be considered a legislative interpretation and an express declaration by Congress that it was intended that aggrieved parties to causes originating before justices of the peace and tried there in the first instance should have the ultimate right of appeal to the Court of Appeals. It would seem to be anomalous to hold that if a litigant removed his cause into the supreme court of the District of Columbia by certiorari he might thereafter appeal to the Court of Appeals from an adverse judgment of the former tribunal, but could not do so if he came into the supreme court by a technical appeal.

It appears clearly, however, that Congress intended to give to aggrieved parties the same substantial rights in the matter of appeals to the Court of Appeals, however they may have come into the supreme court of the District.

III. THE JUDGMENT OF THE SUPREME COURT OF THE DISTRICT OF COLUMBIA WAS ERRONEOUS AND SHOULD BE REVERSED.

In a suit upon a joint contract against three, the plaintiff is not entitled to recover against either of those parties without proving a joint contract as laid, although he does prove a contract, upon which the party against whom he seeks to recover is liable.

Shirreff *v.* Wilks, 1 East., 48.

It is now perfectly well established that a misjoinder of plaintiffs is a ground of nonsuit, as is also a joinder of too many defendants.

2 Stark. Ev., 83.

3 Stark. Ev., 1064.

Tuttle *v.* Cooper, 10 Pickering, 281.

Weall *v.* King, 12 East., 452, was a case for deceit against two, for fraudulent representation and warranty upon the sale of tombs. The proof at the trial was sufficient to establish the charge against one, but not against the other, and the plaintiff was nonsuited, subject to the opinion of the Court of King's Bench.

In giving the opinion of the court, Ellenborough said:

"The joint contract was the foundation of the joint warranty, and essential to its legal existence and validity,"

* * * "the proof of the contract must correspond with the description of it in all material respects." * * * "In this case a joint contract was necessary to be laid, in order to maintain the ground of action as stated upon the record, and being so laid, and not being proved, the plaintiff was properly nonsuited."

Shaw, Ch. J., in Tuttle *v.* Cooper (*supra*), says (p. 287):

"We cannot perceive that it makes any difference in the application of the rule under discussion, or whether one or more be defaulted and a verdict rendered in favor of others, a verdict and a default being equally a proper ground for a judgment, where, upon the whole record, the plaintiff is entitled to it." * * *

"Upon a review of all the cases, we think there is no one which throws any doubt upon the rule of practice, that in an action upon contract against two or more, the contract must be proved as laid, and that in a trial upon the general merits, the plaintiff cannot have a judgment against one or more, where all are not liable."

To like effect are 28 Illinois, 61, and 3 Day (Conn.), 303.

IV. THE PRAYER OF THE PETITIONER SHOULD BE GRANTED.

It is respectfully submitted and urged that a writ of mandamus should issue out of and under the seal of this honorable court, directed to the Court of Appeals of the District of Columbia and each of the justices thereof, commanding and requiring a reinstatement of petitioner's appeal and a hearing and determination of the same on its merits, as required by law.

HENRY P. BLAIR,
FREDERIC D. MCKENNEY,
JOHN SPALDING FLANNERY,
Attorneys for Petitioner, James S. Barton Key.

ther there be a verdict for one defendant
against another

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Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 13. Original.

Ex parte: In the matter of JAMES S. BARTON KEY, *Petitioner.*

Brief for Respondents

WILLIAM C. PRENTISS
Attorney for Respondents

PRESS OF W. F. ROBERTS, WASHINGTON, D. C.

Supreme Court of the United States.

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Ex parte: In the matter of JAMES S. BARTON KEY, *Petitioner.*

BRIEF FOR RESPONDENTS.

The power of this Court to issue writs of mandamus to inferior courts is only incidental to the exercise of its appellate jurisdiction.

Kendall *vs.* U. S., 12 Pet., 524.
Ex parte Bradstreet, 7 Pet., 634.
Re Atlantic City R. R., 164 U. S., 633.
Ins. Co. *vs.* Comstock, 16 Wall., 258, 270.
Ex parte Russell, 15 Wall., 664, 670.

As no federal question within the meaning of the Code D. C., Sec. 223, is presented and the amount involved is too small to come to this court by writ of error, mandamus will not lie.

Ex parte Burdett, 127 U. S., 771.

We submit that the Burdett case negatives power to mandamus as incidental to the exercise of jurisdiction by

certiorari; but if such power exist the question resolves into whether or not *certiorari* would be granted to review a judgment of the Court of Appeals affirming the judgment below, and must be answered in the negative.

The amount involved is only $192.

The case originated before a justice of the peace and the plaintiff there, who was successful, has been dragged into the Supreme Court of the District of Columbia and thence into the Court of Appeals, and put to great expense and trouble in sustaining his judgment.

The question raised by the petitioner as the ground of his appeal, viz: the power of the court to enter a judgment against one of two defendants sued as co-partners, cannot arise in any other case, inasmuch as the Code D. C., which went into effect January 1, 1902, specifically provides in Sec. 1209:

> "In actions *ex contractu* against alleged joint debtors it shall not be necessary for the plaintiff to prove their joint liability as alleged in order to maintain his action, but he shall be entitled to recover, as in actions *ex delicto*, against such of the defendants as shall be shown by the evidence to be jointly indebted to him, or against one only, if he alone is shown to be indebted to him, and judgment shall be rendered as if the others had not been joined in the suit."

And the question now raised by the petition, viz: the right of appeal under the Code as originally passed, cannot arise in any other case, because the amendment to the Code, passed shortly after the dismissal of the petitioner's appeal, repealed one of the conflicting Sections and the Court of Appeals have since recognized the right of appeal in all cases. (See Ans. Par. 9.)

The case is thus unique in presenting, so far as the petitioner is concerned, only questions that cannot arise in any other case and in involving an amount which will hardly exceed the costs of these proceedings in this court, and yet the

petitioner, in effect, seeks to have this court assume jurisdiction by *certiorari* and issue the writ of mandamus in aid of that jurisdiction.

The appeal was fatally defective for lack of necessary co-party-appellant.

The judgment appealed from was against the petitioner and the surety on the undertaking on appeal from the justice of the peace (R. 5), and the appeal was by the petitioner alone without joining the surety, and without summons and severance. (R. 5-6.)

The motion to dismiss (R. 21) assigned this ground as well as lack of jurisdiction, and the objection was fatal.

Eastland *vs.* Jones, Minor, 275.
Thomas *vs.* Wyatt, 17 Miss., 308.
Humes *vs.* Third Nat. Bank, 54 Fed., 917.
Godfrey *vs.* Roessle, 5 D. C. App., 299.
Mason *vs.* U. S., 136 U. S., 581.
Hardee *vs.* Wilson, 146 U. S., 179.
Beardsley *vs.* Ry. Co., 158 U. S., 123.

The judgment of the Court of Appeals dismissing the appeal (R. 22) is *res judicata* of both grounds of objection, as both go to the question of jurisdiction.

The petition here does not mention the omission of necessary party and urges no ground for relief in that respect.

Nor could the omission of necessary party be cured by amendment.

Leave to amend was denied in *Mason vs. U. S., supra*, a

case involving ever $100,000, and the ruling there must be regarded as notice to the bar that strictness in the matter of proper parties to appeals would thereafter be required.

Nor does the record show any attempt to cure the defect.

Even were amendment possible, leave to amend would be a matter of discretion in the court below (*Pearson vs. Yewdall*, 95 U. S., 294; *Slater vs. Hamacker*, 15 D. C. App. 294), which could not be controlled by mandamus.

In *Pearson vs. Yewdall* this court held that amendment will not be allowed where the question presented had been many times decided and when to grant the amendment would only lead to unnecessary delay and expense; and, as we show later, the question raised by the bill of exceptions and appeal had not only been decided by the Court of Appeals adversely to the petitioner's contention prior to the Code D. C., but was directly controlled by Sec. 1209 of the Code, *supra*, enacted pending the suit.

With respect to the case of *Inland, etc., Co. vs. Tolson* (136 U. S., 572), where amendment adding sureties as plaintiffs in error was allowed just a few days before action in *Mason vs. U. S., supra*, the situation was peculiar, inasmuch as the judgment was of a double aspect, first against the defendant alone and then a recovery against him and the sureties on his undertaking on appeal, under a then recently adopted rule of court which, as well as the form of the judgment, counsel pleaded had not been brought to his notice, while here the judgment against the surety was pursuant to the act of 1895 and a rule of court thereunder of seven years standing.

Again, as the surety was a necessary party to the appeal, it is equally a necessary party to the petition for mandamus, and, being omitted, the petition must be dismissed for that reason irrespective of any other.

The ruling of the respondents upon the right of appeal was correct.

As the two sections of the Code were apparently conflicting, it was necessary to construe them so as to give both effect, if possible, and by the application of sound principles this was done We deem it unnecessary to repeat the argument contained in the opinions of the respondents (R., 25, 29) and merely submit here some considerations by way of reply to the contention of the petitioner.

Before the adoption of the Code there was no appeal from the judgment of the circuit court in cases appealed from justices of the peace.

Luchs *vs.* Jones, 1 McA., 345.
Hoeling *vs.* McCord, 20 D. C., 35.
Ex parte Redmond, 3 D. C. App., 317.
Sturges *vs.* Hancock, 4 D. C. App., 289.
Mitchell *vs.* Evans, 29 Wash. Law Rep., 399.

And no proceeding by way of certiorari to remove a case from a justice of the peace to the circuit court for trial in the first instance.

Hendley *vs.* Clarke, 8 App. D. C., 165.

The Code, as drafted by Mr. Justice Cox, amended by the bench and bar of this District and passed by the House of Representatives, contained Sec. 8, providing for the removal of cases of concurrent jurisdiction (involving fifty dollars or more) from justices of the peace to the circuit court by certiorari for trial in the first instance; Sec. 30, providing for appeal from judgments of justices of the peace to the circuit court in cases involving five dollars or more; Sec. 80, providing for the hearing of such appeals in a summary way, *de novo*, unless a jury trial were demanded; Sec. 82, prohibiting any further appeal in such cases, and Sec. 226, providing for appeal from any final order, judgment, or decree of the Supreme Court of the District of Columbia to the Court of Appeals.

The quoted clause in Sec. 226 as finally passed, upon which

the petitioner relies, was one of a number of amendments hurried into the Code at the time of its passage in the Senate (ostensibly as being favorably reported by the committee, but in fact against the expressed protest of the chairman that it was not so) without consideration or debate (See Cong. Record, 1900–1901, p. 3495), and forced on the Senate and House as a condition of allowing the Code to pass. Sec. 82 was not sought to be amended or stricken out, but remained as the deliberate will of Congress, expressing the judgment of the bench and bar of this District.

It is thus apparent that the insertion of the quoted clause in Sec. 228 was a plain legislative blunder.

It could not be presumed that Congress, in the face of the specific and emphatic prohibition of Sec. 82, could have intended, by this inserted clause in Sec. 226, to burden the Court of Appeals with the review of these trifling cases originating before justices of the peace, which by Sec. 80 were directed to be tried in the circuit court summarily, and the Court of Appeals rightfully held that the general language of Sec. 226 must be limited by the particular language of Sec. 82 and, as so limited, held to apply to cases appealed by certiorari (Sec. 8) for trial in the first instance in the circuit court, where pleadings and issues could be required and the trial would be by jury, with opportunity for bill of exceptions to bring only errors of law to the Court of Appeals for review in the ordinary and proper manner.

The petitioner contends that the supposed rule of construction that in case of repugnancy the last part of the statute is to be taken to express the intention of the law maker (which, for brevity, may be styled the last clause rule) must override this solution of the difficulty, cast upon the Court of Appeals the indignity of sitting as a *pie poudre* tribunal and permit one litigious small suitor to compel the other to shake the dust off his feet in three courts, with the ultimate possibility of being dragged to this highest tribunal in the land by *certiorari*, for

it is upon the jurisdiction of this Court by *certiorari* that the petitioner necessarily relies in his application for mandamus.

As the Court of Appeals said in *ex parte Redmond, supra*, nothing short of an express provision, referring to such cases in terms, would justify the conclusion that Congress could intend to establish such a burdensome, inconvenient and costly system, and we submit that not only must such a statute be express but, as well, clear, unequivocal, unambiguous and not contain a solemn and emphatic negative; and such a statute was not presented until Congress amended the Code by striking out Sec. 82, leaving Sec. 226 standing unqualified by any other provision.

In view of all these considerations, the supposed last clause rule could have no application here, for all the text-writers and authorities have treated it as purely arbitrary and fanciful and merely a final resort when all other considerations fail.

But the last clause rule is not sound nor established by authority.

It is undeniable that the reason of the rule is fanciful and opposed to fact, for all parts of a statute are enacted at the same instant; and an examination of the antecedents of the rule shows it to be unsupported by precedent, questioned by text writers and repudiated by courts that have not blindly accepted the announcement of it in Bacon's Abridgement, where it is first found.

Bacon cites, as his authority, the case of Attorney General *vs.* the Governor and Company of the Chelsea Water Works, Fitzgibbon, 195, the report of which is very brief:

> "In Scacc. Per Reynolds, chief baron, Comyns and Thomson, barons. The question being upon the construction of the late land tax act; it was held that where the proviso of an act of Parliament is directly repugnant to the purview, the proviso shall stand and be a repeal of the purview, as it speaks the last intention of the makers; and it was compared at the bar to a will in which the latter part, if inconsistent with the former, shall supersede and revoke it."

[With reference to Fitzgibbon, see Marvin's Legal Bibliography, 311: "Most of the cases in this volume are said to be incorrectly reported and of no authority." See also The Reporters, Wallace, 427].

It was held, however, in other cases, that a saving clause (likewise subsequent in position) totally repugnant to the purview, must be rejected.

So that mere position of the proviso in the act is seen not to be a sound reason for the case in Fitzgibbon and that being a case merely of a repugnant proviso (if the reporter can be relied on) there was no authority for the broad last clause rule as announced by Bacon; and there seems to be no other case in the English reports.

Holt, Ch. J., in 6 Mod. 287, a case involving two repugnant orders respecting the poor of a parish, made at the same justices' sessions, is reported: "'If they should generally refer to the same sessions I don't know which to take for law.' And he quoted a case of the Town of Colchester here some years ago exactly like this; and for that the second order did not expressly repeal the first order and that the justices did return them both as orders the second order was quashed and the first set up."

The Fitzgibbon case is criticised by Chancellor Kent, who could see no reason for the distinction between a saving clause and a proviso. 1 Com. 462.

See also Farmers Bank *vs.* Hale, 57 N. Y. 59, where a repugnant later clause was construed to be a proviso and for that reason held to govern a previous clause, the court saying there seemed to be a settled distinction between the effect of a repugnant saving clause and a repugnant proviso, whether any sound reason existed for the distinction or not.

Bishop (Written Law, 63–65) contends that this last clause rule is unsupported by reason or authority.

Sutherland (Statutory Construction, Secs. 220–221) treats the rule as doubtful and says that it and the reason for it have been criticised.

And see State *vs.* Heidorn, 74 Mo. 410, where the reasonable view is taken and it is said that *if two clauses in the same statute are irreconcilably repugnant they nullify each other.*

Sams *vs.* King, 18 Fla. 557 (particularly applicable here), where a subsequent provision was qualified to give it effect consistent with previous provisions which the court deemed to be more consistent with sound policy.

And State *vs.* Williams, 8 Ind. 191, where the first clause was clear and explicit and sustained as against a later which was not.

An examination of the cases cited by text writers in support of this supposed rule fails to disclose a single case of repugnancy being resolved by its unaided application.

It will be found, if the inquiry be deemed profitable, that in all of the cases cited in the books, the repugnancy was resolved without the aid of the rule or that reference to the rule was *obiter;* but it seems sufficient for present purposes to refer only to the cases cited in the brief for petitioner.

Powers *vs.* Barney, 5 Blatch., 202. The court reached the same result by application of the rule that a tariff act is to be construed in favor of the importer, a rule which would have controlled even had the repugnant clauses been reversed in position in the act.

State *vs.* Hull, 5 Rich., 120. Last clause rule not invoked.

Elliot *vs.* Lochnane, 1 Kan., 135. A case of subsequent statute.

Ryan *vs.* State, 5 Neb., 276. Last clause rule not invoked by counsel. The last clause of the act in question was in effect a proviso: "This act shall not in any way affect sections 49 and 50 of the general revenue laws as found in the Revised Statutes of 1873;" and it was held that these provisions remained in force, a result reached by considerations other than mere position of the clause.

Gibbons *vs.* Brittenum, 56 Miss., 232. The conflict was

between sections of a codification adopted by the legislature and approved by the governor at different times as separate acts and the doctrine of subsequent statute was applied.

Packer *vs.* R. R. Co., 19 Pa. St., 211. The court held all the statute consistent.

Brown *vs.* County Commissioners, 21 Penna. St., 37. A case of subsequent statute.

Southwark Bank *vs.* Commonwealth, 26 Penna. St., 446. A case of subsequent statute.

Ex parte Ray and Defoe, 45 Ala., 15. The apparent repugnancy was resolved without the aid of the rule.

Harrington *vs.* Rochester, 10 Wend., 547. A case of subsequent statute.

Commercial Bank *vs.* Chambers, 8 Sm. & M., 9. A case of subsequent statute.

Quick *vs.* Whitewater Township, 7 Ind., 570. The question before the court was satisfactorily resolved without the aid of the last clause rule.

Albertson *vs.* State, 9 Neb., 429. The apparent conflict was resolved by application of the rule that a special provision will prevail over a general one.

Sams *vs.* King, 18 Fla., 557. See *supra*. The court says:

> "We cannot think that the legislature after plainly giving the right to contest the regularity of the proceedings * * * intended by the general terms used in the last clause of Sec. 65 to deny this right."

Branagan *vs.* Dulaney, 8 Colo., 408. The apparent conflict was resolved without the aid of the last clause rule and that rule was only casually referred to in connection with a suggested possible intention of Congress which the court did not seriously consider.

Gee *vs.* Thompson, 10 La. Ann., 657. The court satisfactorily resolved the supposed repugnancy and did not mention the last clause rule.

Peete *vs.* Nalle, 30 La. Ann. Pt. II, 949. The repugnancy

was between a section of the Revised Statutes and a section of the Civil Code, the latter of which, by provision in the Revised Statutes, prevailed in case of conflict. The last clause rule is not mentioned.

Hamilton *vs.* Buxton, 6 Ark., 24. Merely applied a statutory rule of interpretation and did not refer to the last clause rule.

So, there being no such rule of construction, if Secs. 82 and 226 were irreconcilably repugnant they nullified each other, the law stood as it did before the passage of the Code, and appeal did not lie. (See opinion on motion for rehearing, R., 29).

The evidence, as presented by the bill of exceptions established a partnership between Key and Scott, the trial court should have directed a verdict against both defendants, Key cannot, in any event, take advantage of the error of the trial court in this respect and the judgment against him would necessarily stand.

At the trial the defendants, in effect, demurred to the plaintiffs evidence, which consisted of a letter from Key to Scott expressing the terms of their agreement (R. 8), a bill in equity by Scott against Key, setting up the agreement substantially as expressed in Key's letter (R. 10), a letter from Scott to Moses & Sons declaring his financial interest in the enterprise (R. 16), a letter from Scott to Key referring to himself (Scott) as Key's partner (Key's testimony R. 15) and the testimony of witnesses; from which sources the following facts appear:

Key had no money (his own testimony, R. 14.).

Scott was to, and did, become surety on the bond to secure the landlord [Key's letter and testimony (R. 14) and Scott's bill].

Scott was to, and did, furnish all the capital for the enterprise (Key's testimony, R. 14).

Scott was to invest $5,000 in repairing, improving and opening the hotel (Key's letter). Scott was to advance not to exceed $5,000 for the purpose of necessary repairs and improvements (Scott's bill).

This $5,000 to be repaid out of the rebate in rent on account of improvements and repairs (Key's letter and Scott's bill).

The finances to be handled by a treasurer or cashier to be appointed or approved by Scott (Key's letter). Scott, by his agent acting as treasurer or cashier to handle all the receipts of the business (Scott's bill).

All payments to be made on joint check of such treasurer or cashier and Key (Key's letter).

Scott to receive for his own use one-half of the profits (Scott's bill). Scott to receive a sum of money equal to one-half of Key's profits (Key's letter).

Scott advanced, to be applied in stocking, equipping and preparing the hotel, further sums amounting to $3,000 and indorsed notes for same purpose to amount of $2,000 (Scott's bill).

Scott declares that he is financially interested with Key in the enterprise (Scott's letter to Moses).

Scott resided at the hotel (Daly, R. 9) but his name did not appear on register or guests' ledger (Key, R. 15); Key habitually introduced Scott as his partner (Daly, R. 9); Scott stated he was going to bring his cousin (Mrs. Page) there to act as cashier and sign checks (Daly, R. 9, 10); Scott referred to the bar and bartender as his (Daly, R. 10); Key and Scott had a falling out and Scott insisted on putting some one else in Key's place and having direction of matters (Key, R. 14, 15) and after this falling out Key told the bartender he was going, shook hands with him, said good bye and left the hotel (Daly, R. 9), Scott thereupon told Daly to continue and he would see that everything went right and that Mrs. Page would

receive the money (Daly, R. 9) and Mrs. Page acted as cashier and turned the receipts in to Scott (Daly, R. 9.)

The only thing lacking is the label PARTNERSHIP.

> Where the transaction is a mere device to obtain the benefits of a partnership without incurring its responsibilities, whatever the parties may call it, it will be construed to be a partnership.
> 17 Enc. Law, 853.

Formerly it was held that sharing profits, *ipso facto*, constituted partnership as to third persons, but this rule has been relaxed to the extent, first, of allowing an exception where the share of profits is made the measure of compensation for services and, later, where the share of profits is in lieu of interest for a loan of money.

The rule is now stated that sharing profits is *prima facie* evidence of partnership and the burden is on the party denying partnership to bring the case within one of these two exceptions.

The latest leading case is *Meehan* vs. *Valentine*, 145 U. S., 611, where this court, after having the matter under advisement for nearly two years, reviewed all the authorities and left little to be said on the subject. An application of the principles there announced necessarily characterizes the relations of Key and Scott as a partnership as to third persons.

Each and all of the features of the case here are inconsistent with the theory of *mere loan*. Note the distinctions drawn by the majority of the court in holding the Meehan case within the second exception:

> In some of the cases most relied on by the plaintiff, the person held liable as a partner furnished the *whole capital* on which the business was carried on by another, *or else contributed part of the capital and took an active part in the management of the business.* (Citing cases). And in Mollwo *vs.* Court of Wards, above cited, after speaking of a contract of loan and security, in which

no partnership was intended, it was justly observed: "If cases should occur where any persons, under the guise of such an arrangement, are really trading as principals, and putting forward as ostensible traders, others who are really their agents, they must not hope by such devices to escape liability, for the law in cases of this kind will look at the body and substance of the arrangements, and fasten the responsibility on the parties according to their true and real character." (Citation). But in the case at bar no such element is found.

Throughout the original agreement and the renewals thereof, the sum of $10,000 paid by Perry to the partnership, and for which they *gave him their promissory notes*, is spoken of as a loan, for which the partnership was to pay him legal interest at all events and also pay him one-tenth of the net yearly profits of the partnership business, if those profits should exceed the sum of $10,000. The manifest intention of the parties, as apparent upon the face of the agreements, was to create the relation of debtor and creditor, and not that of partners. Perry's demanding and receiving accounts and payments yearly was in accordance with his right as a creditor. There is nothing in the agreement itself, or in the conduct of the parties, to show that he exercised any other relation. *He never exercised any control over the business.*

HERE, Scott was to, and did, furnish *all of the capital*, even the *sine que non* of the lease, the *bond to the landlord.*

The $5,000 was not characterized even by the parties themselves as a loan, but as an *investment* in repairing and opening the hotel (Key's letter) or as an advance for the purpose of necessary repairs and improvements (Scott's bill) and Scott, in his letter to Moses, says he is financially interested with Key in the enterprise.

Where one lends money to another expressly for use in a certain business and for no other use whatsoever, and that other is to make regular statements of the condition of the business, the two dividing equally the yearly net profits, they are partners.

Hackett *vs.* Stanley, 14 Daly, N. Y. 210.

17 Enc., 853.

The $5,000 was not to be repaid by Key out of his own resources for he had none, but out of the proceeds of the business—the rebate of the rent, in consideration of the improvements and repairs, to go to Scott instead of to the landlord. *Key's letter, which must be accepted as the best evidence of the agreement, contains no personal undertaking on his part to repay the $5,000.*

See 17 Enc., 852.

Scott was to control the finances of the business through his agent (treasurer or cashier) who was to sign checks jointly with Key for all expenditures. This of itself is a controlling test of partnership.

17 Enc., 843-4.

Keys's expression, Scott to receive a sum of money equal to one-half Key's profit, is equivalent to Scott's expression, to receive for his own use one-half of the profits.

> It has been laid down in quite a large number of cases that there must be a sharing in losses as well as in profits to constitute a partnership, but the later and better rule would seem to be that a community of interest in the profits as such is sufficient, community of interest in the profits meaning a proprietorship, or a property right in them from the start, as much in one as in the other, as distinguished from a personal claim by the one against the other. And whether it is such depends upon no arbitrary use of phrases, *but may apply as well to the receipt of a certain sum equal to a share of the profits, as to a share of the profits by that name.*
>
> 17 Enc., 841.
> Parker *vs.* Canfield, 37 Conn., 266.

"Actual participation in the profits as principal we think creates a partnership as between the parties and third persons, whatever may be their intention in that behalf, and not withstanding the dormant partner was not expected to participate in the loss beyond the amount of the profits. Every man who has a share of

> the profits of a trade or business ought also to bear his share of the loss, for the reason that in taking a part of the profits, he takes a part of the fund of the trade on which the creditor relies for payment. (Citing cases.) Actual partnership as between a creditor and the dormant partner, is considered by the law to subsist where there has been a participation in the profits although the participant may have expressly stipulated with his associates against all the usual incidents to that relation."
>
> Berthold *vs.* Goldsmith, 24 How., 536.

Scott's bill was, in effect, a bill by one partner against the other, the ultimate object of which was an accounting and settlement of partnership affairs.

The right to an accounting is one of the incidents of partnership.

> "Unless the supposed dormant partner is in some way interested in the profits of the business as principal, it is plain that he cannot bring suit as a partner and go into equity and compel an accounting; nor can it be held that he has any such lien on the profits as a court of equity may enforce; and if not, his condition is that of an ordinary creditor, and he must pursue his remedy against his employer."
>
> Berthold *vs.* Goldsmith, *supra*.

Counsel for defendant rely on cases where the question was partnership *inter se*. *Vide* London Assn. *vs.* Drennen, 116 U. S., 472. As between themselves partnership cannot exist against intention, but as to third persons partnership will be declared according to the effect of the agreement between the parties and intention ignored. Meehan *vs.* Valentine, *supra*.

See also recent parallel cases—

Hull *vs.* Barth, 62 N. Y. S., 946.
1st Nat. Bank *vs.* Ballard, 19 Ohio C. C. R., 63.
Nat. Bank *vs.* Galladet, 122 N. Y., 655.
Firt Co. *vs.* Reams, 105 N. C., 283.

Finally, the ruling of the trial court upon the question of the right of recovery against one of the alleged partners was in accord with the settled construction of R. S. D. C., Sec. 827, which provides:

> "Where money is payable by two or more persons jointly or severally, as by joint obligors, covenantors, makers, drawers, or indorsers, one action may be sustained and judgment recovered against all or any of the parties by whom the money is payable, at the option of the plaintiff."

In Presbrey *vs.* Thomas, 1 App. D. C., 171, the court said:

> "The liability of partners on partnership contracts, except it be of a special nature, is several as well as joint, and the assumpsit is made by all, and by each. Barry *vs.* Foyles, 1 Pet., 311, 317." (See also Chesley *vs.* Riley, 20 D. C., 166, and Burdette *vs.* Bartlett, 95 U. S., 637). "But this case is clearly within the express provision of Sec. 827 of Rev. Stat. Dist. Col., where it is provided" (*vide supra*).
>
> "In thus providing for the case of money payable by two or more persons is clearly meant where there is apparent liability of two or more persons, according to the terms or import of the contract sued on, and not as may be shown by the proof; for the contract may import an obligation or promise by two or more persons, and yet the proof show the money to be payable by and recoverable of one of the parties only. Bibb *vs.* Allen, 149 U. S., 481, 502, 503, 504."

And in Harris *vs.* Leonhardt, 2 App. D. C., 318, it was held that, under R. S. D. C., Sec. 827, the entry of judgment against one of two defendants sued jointly, does not merge the cause of action nor bar the recovery of a subsequent judgment in the same suit against the other.

The Code D. C., however, had gone into effect before the trial of this case in the Circuit Court and Sec. 1209 specifically provided, under the head of *evidence*, that:

> "In actions *ex contractu* against alleged joint debtors it shall not be necessary for the plaintiff to prove their joint liability as alleged in order to maintain his action, but he shall be entitled to recover, as in actions *ex delicto*, against such of the defendants as shall be shown by the evidence to be jointly indebted to him, or against one only, if he alone is shown to be indebted to him, and judgment shall be rendered as if the others had not been joined in the suit."

This provision, affecting only the rules of evidence or procedure, applied to pending causes and coutrolled this case.

Marx *vs.* Hanthorn, 148 U. S., 172, 181.

Furthermore, the R. S. D. C. (Sec. 775), provided in cases of appeal from justices of the peace, that:

> "The Supreme Court shall in a summary way hear the allegations and proofs of both parties, and determine upon the same according to law and equity and right of the matter,"

with right to demand trial by jury.

And the Code contained a similar provision (Sec. 80):

> "On such appeal the Circuit Court shall, in a summary way, hear the case *de novo* upon the proofs and allegations of the parties, and determine the same according to law and the equity and right of the matter; but either party may demand a trial by jury."

As pleadings are not required in these cases and technicality is dispensed with, it is apparent that (aside from all other considerations) Key being admittedly responsible for the account sued on, *the equity and right of the matter* required judgment to be entered against him.

We respectfully submit that the rule must be discharged and the petition dismissed.

WILLIAM C. PRENTISS,
Attorney for Respondents.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 13, ORIGINAL.

EX PARTE: IN THE MATTER OF JAMES S. BARTON KEY, PETITIONER.

TRANSCRIPT OF RECORD FROM COURT OF APPEALS, DISTRICT OF COLUMBIA, APRIL TERM, 1902.

No. 1220.

JAMES S. BARTON KEY, APPELLANT,

vs.

WILLIAM F. ROBERTS.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED MAY 14, 1902.

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In the Court of Appeals of the District of Columbia

JAMES S. BARTON KEY, Appellant,
vs.
WILLIAM F. ROBERTS. } No. 1220.

a Supreme Court of the District of Columbia.

WILLIAM F. ROBERTS, Plaintiff,
vs.
JAMES S. BARTON KEY and JAMES P. SCOTT, Copartners, Defendants. } No. 44625. At Law.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Writ.*

Filed April 18, 1902.

44625.

DISTRICT OF COLUMBIA, *ss:*

The President of the United States to Aulick Palmer, U. S. marshal, Greeting:

Summon J. S. Barton Key and James P. Scott, copartners, to be and to appear before me, the subscriber, a justice of the peace in and for the District aforesaid, on the 9th day of Feb., A. D. 1901, at 10 o'clock a. m., to answer unto the complaint of William F. Roberts in a plea of debt of $196.30.

Given under my hand and seal this 5th day of Feb., A. D. 1901.

A. S. TAYLOR, *J. P.* [SEAL.]

Marshal's Return.

8th day of Feb'y, 1901, personally summoned as within directed as to James P. Scott.

AULICK PALMER,
U. S. Marshal.

2 *Writ.*

Filed April 18, 1901.

44625.

DISTRICT OF COLUMBIA, *ss:*

The President of the United States to C. V. Mallet or any qualified constable, Greeting:

Summon J. S. Barton Key and James P. Scott, copartners, to be and to appear before me, the subscriber, a justice of the peace in and for the District aforesaid, on the 9 day of Feb., A. D. 1901, at 10 o'clock a. m., to answer unto the complaint of William F. Roberts in a plea of debt of $196.30.

Given under my hand and seal this 5 day of Feb., A. D. 1901.

A. S. TAYLOR, *J. P.* [SEAL.]

Constable's Return.

FEB. 13TH, 1901.

Summoned as within directed as to J. S. Barton Key.

CHARLES V. MALLET, *Constable.*

3 *Itemized Bill of W. F. Roberts.*

Filed April 18, 1901.

J. S. Barton Key [and James P. Scott, copartners]* Dr., to W. F. Roberts, 730 15th street, Washington city. 44625.

1900.				
Dec.	1	To 200 letter & 200 ½ letter-hdgs	3 50	
	7	" 200 wine cards	1 50	
	11	" 500 envelopes	2 50	
	13	" sketch of arms	1 25	
	15	" 1000 letter-headings	5 50	
		" 1000 ½ letter-hdgs	3 50	
	21	" 1000 follow sheets	4 00	
	24	" 1000 wine cards	2 50	
	31	" 200 circulars, envs. & autograph	7 00	
				31 25
1901.				
Jan.	8	" 100 invitations & envelopes	3 00	
		" 75 dinner slips	3 00	
	9	" 50 special evening cards	4 50	
	10	" 100 dinner slips, 2nd lot	3 00	
	11	" 12 special menus, Mrs. May	2 00	
		" 100 cloak checks	1 00	
	12	" 100 " "	1 00	
		" 50 all-day bills	10 00	
	14	" 25 breakfast bills	6 25	
		" 25 all-day bills & changing	5 50	
		" 1000 envelopes	3 00	
		" 4 cards, officers' breakfast	1 25	
	15	" 1500 letter-headings	7 00	
		" 1500 note "	6 00	
		" 25 all-day bills & changing	5 50	[$1 pd. Marshal.]*

[*Words and figures enclosed in brackets in pencil in copy.]

		To 4 cards, officers' breakfast	1 25	
	16	" 1000 bills	3 25	
	17	" 1000 invitations, 850 envelopes	10 25	
	18	" 100 special booklets, breakfast	28 50	
	19	" creet	7 50	
		" 25 wine lists	9 00	
		" 100 special muenus, 19th & 20th	1 75	
		" 100 cards, automobile service	2 25	
		" 30 special Sunday lunch	1 25	
				127 00
[1.65 pd.]* [1.60 "]*				158 25
4		Amount forward	158 25	
Jan.	19	To 50 night luncheon	1 25	
	25	" 200 circulars, 250 envelopes	4 25	
	26	" 12 wine lists	1 25	
		" 40 menus, newspaper men	2 50	
		" 8 special menus, Sat., 26th	1 00	
	28	" 1000 small bills	2 50	
	30	" 25 all-day bills	2 50	
		" 1000 6¾ envelopes	3 00	
		" *Carte du Jour*, 14 days	13 80	
				190 30
Feb.	2	" 25 special evening cards	1 50	
		" 50 all-day bills	3 00	
		" 40 menus, Lehigh	1 50	
				6 00
				196 30

[* Words and figures enclosed in brackets in pencil in copy.]

Memorandum.

April 9, 1901.—Appeal and appeal bond filed in justice's court.

5 *Certificate of Proceedings.*

Filed April 18, 1901.

In Justice's Court of the District of Columbia—Before Anson S. Taylor, a Justice of the Peace.

WILLIAM F. ROBERTS, Plaintiff,
vs.
J. S. BARTON KEY and JAMES P. SCOTT, Copartners, Defendants.

No. 48692. Action for Debt for $196.30. 44625.

Date.	Proceedings.
Feb. 5, 1901	Summons issued to C. V. Mallet, constable; also to Aulick Palmer, U. S. marshal; returned Feb. 8/01, summoned as within directed, personally as to Jas. P. Scott. Aulick Palmer, U. S. marshal. Feb. 9/01, plaintiff appeared by counsel, def'd't Scott by counsel, and case continued until Feb. 14/01, 2.30 p. m. Feb. 13/01, summons returned, summoned as within directed as to J. S. Barton Key. C. V. Mallet, constable. Feb. 13/01, subpœna issued for J. S. Barton Key and Chas. Dailey, witnesses for plaintiff; returned Feb. 14/01, summoned as within directed. C. V. Mallet, constable. 1.60/100 costs. Feb. 14/01, continued until Feb. 19/01, 3 p. m.; again until Feb. 26/01 3 p. m.; again until Mar. 6/01, 3 p. m.; again until Mar. 13/01, 3 p. m.; again until Mar. 20/01, 3. p. m.; again until Mar. 27/01, 3 p. m.; again until April 3/01, 3 p. m.
April 3, 1901	Judgment for plaintiff after trial for $196.30/100 debt, on interest from Feb. 5, '01, with $6 60/100 costs. Notice of appeal given April 11/01. Undertaking on appeal filed and approved, with the United States Fidelity and Guarantee Co. as surety, 75c. costs. April 11/01, certification appeal, 50c. costs. A. S. TAYLOR, *J. P.* [SEAL.]

6 DISTRICT OF COLUMBIA, *County of Washington,* } *ss:*

I, Anson S. Taylor, one of the justices of the peace in and for the said county and District, do hereby certify that the foregoing is a true statement from my docket of all the proceedings had before me in the above cause, and that the annexed are all the original papers therein.

Given under my hand and seal this 11 day of April, A. D. 1901.

A. S. TAYLOR, *J. P.* [SEAL.]

Cost, paid by plaintiff, $6.60.
Cost, paid by defendant, $1.25.

Supreme Court of the District of Columbia.

Memorandum.

January 23, 1902.—Verdict for plaintiff against J. S. Barton Key, defendant, for $196.30.

7 Supreme Court of the District of Columbia.

FRIDAY, *February* 28, 1902.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

* * * * * * *

By Justice Anderson.

WILLIAM F. ROBERTS, Plaintiff,
vs.
JAMES S. BARTON KEY and JAMES P. SCOTT, Defendants. } At Law. No. 44625.

Upon hearing the motion for a new trial filed herein by the plaintiff, it is considered that said motion be, and hereby is, overruled and judgment on verdict ordered; therefore it is considered that the plaintiff recover against James S. Barton Key and the United States Fidelity and Guaranty Company, his surety, one hundred and ninety-six dollars and thirty cents ($196.30), being the money payable by them to the plaintiff by reason of the premises, together with his costs of suit, to be taxed by the clerk, and have execution thereof; and, further, it is considered that James P. Scott go thereof without day and recover against the plaintiff his costs of defense, to be taxed by the clerk, and have execution thereof.

8 *Order for Appeal.*

Filed March 7, 1902.

In the Supreme Court of the District of Columbia, the 7th Day of March, 1902.

WILLIAM F. ROBERTS, Plaintiff,
vs.
JAMES S. BARTON KEY and JAMES P. SCOTT, Copartners. } At Law. No. 44625.

The clerk of said court will please note an appeal to the Court of Appeals from the judgment entered in the above cause on February 28th, 1902, and issue citation.

HENRY P. BLAIR,
Attorney for J. S. Barton Key.

9 In the Supreme Court of the District of Columbia.

WILLIAM F. ROBERTS
vs.
JAMES S. BARTON KEY and JAMES P. SCOTT. } At Law. No. 44625.

The President of the United States to William F. Roberts, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause

therein, under and as directed by the rules of said court, pursuant to an appeal filed in the clerk's office of the supreme court of the District of Columbia on the 7th day of March, 1902, wherein James S. Barton Key is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 7th day of March, in the year of our Lord one thousand nine hundred and two (1902).

J. R. YOUNG, *Clerk*,
By W. E. WILLIAMS, *Ass't Clerk*.

Service of the above citation accepted this 14th day of March, 1902.

W. C. PRENTISS,
Attorney for Appellee.

10 *Memorandum.*

March 13, 1902.—$50 deposited in lieu of appeal bond.

Memorandum.

March 31, 1902.—Term prolonged 38 days to settle exceptions.

11 Supreme Court of the District of Columbia.

MONDAY, *April* 28, 1902.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

* * * * * * *

WILLIAM F. ROBERTS, Plaintiff,
vs.
J. S. BARTON KEY ET AL., Defendants. } At Law. No. 44625.

Now again comes here the defendant J. S. Barton Key, by his attorney, and tenders to the court here his bill of exceptions taken during the trial of this cause, and prays that the same may be duly signed, sealed, and made part of the record, now for then, which is accordingly done.

12 *Bill of Exceptions.*

Filed April 28, 1902.

In the Supreme Court of the District of Columbia.

WILLIAM F. ROBERTS, Plaintiff,
vs.
J. S. BARTON KEY and JAMES P. SCOTT, Co-partners, Defendants. } No. 44625. At Law.

Bill of exceptions.

Be it remembered that the above-entitled cause came on for trial before Mr. Justice Anderson and a jury on January 20th, 1902, Mr. William C. Prentiss appearing on behalf the plaintiff, Mr. Henry P. Blair appearing on behalf of the defendant J. S. Barton Key, and Mr. F. D. McKenney and Mr. J. S. Flannery on behalf of the defendant James P. Scott.

Thereupon the plaintiff demanded that a jury be drawn, and, the attorneys for the respective defendants assenting thereto,
13 a jury was drawn, and, counsel for all parties having waived any and all objection to the manner in which said panel was made up or drawn, said jury was sworn.

And thereupon counsel for the plaintiff, to maintain the issues on his part joined, introduced evidence as follows:

WILLIAM F. ROBERTS, the plaintiff, as a witness in his own behalf, stated that his occupation was that of engraving and printing stationery; that he was acquainted with the defendant Key, but not with the defendant Scott; that he had had business dealings with the defendant Key in the way of supplying printed bills of fare, note-heads, and stationery for the Hotel Barton; that he had his books of original entry containing the account for such supplies in court; that all orders covering the different items of work and stationery were placed with him by Mr. Key; that the transcript of the account annexed to the writ in this case was a correct transcript from his ledger; that the account as so made up was rendered to Mr. Key and admitted by him to be correct.

Thereupon, on cross-examination by the attorney for the defendant Scott, the witness stated that the pencil writing on said transcript of account annexed to the writ in this case was in the handwriting of his attorney, Mr. Prentiss; that witness had never had any conversation with Mr. Scott in regard to the business covered by the account sued on at any time; that all orders were given to him by Mr. Key or by Mr. Key's chef; that all charges on his books of original entry and on his ledger relating to this account were entered in the name of "J. S. Key," "J. Bar-
14 ton Key," and "Hotel Barton;" that none of them were entered in the name of Mr. Scott, nor does Mr. Scott's name

appear in connection with such items on those books; the sole debtor's name on the ledger in connection with said items is that of J. S. Barton Key; that the typewritten transcript of the account annexed to the writ in this case is a correct copy of the ledger account, in so far as it is typewritten; that the words "and James P. Scott, copartners," which are written on the account in lead pencil, were written thereon by Mr. Prentiss after the time the suit was brought or just about the time; that this account was made up about the time the hotel went into the hands of the receiver—that is, about February 4th or February 5th.

Witness also testified on cross-examination that the printing done by him included envelopes and letter-heads, wine cards, cloak checks, and the like; that on some of these papers no name appeared except the name of the hotel, and that on the letter-headings on which Mr. Key's name appeared his name was followed by the word "proprietor;" that no payments had been made on the present account; that prior to the opening of the present account Mr. Key had a small account for stationery for the Hotel Barton, and had settled the same; that said account was paid by check, and while witness did not remember fully about the check he had no doubt that the same was a check of Mr. Key.

Thereupon, at the demand of the attorney for the plaintiff and pursuant to notice duly served upon him in accordance with
15 rules of court, the attorney for the defendant Scott produced and handed to attorney for plaintiff the following letter, which was thereupon read in evidence without objection:

"Room 719, Postal Telegraph building.

NEW YORK, *Nov.* 7, 1900.

Mr. James P. Scott, Waldorf-Astoria, New York.

DEAR SIR: I write this to confirm our conversation of a few days ago, until such papers can be executed that will be satisfactory to both parties.

It is understood by me that I hereby bind myself to the effect that in consideration of your going on my bond for the lease of the Wellington Hotel property and investing in repairing and opening said hotel a sum of money not to exceed $5,000, which $5,000 under the terms of my lease are to be deducted from the rent at the rate of $1,000 per year, I hereby agree that the finances of the said hotel shall be handled by a treasurer or cashier to be appointed or approved by you; that all payments shall be made only on joint check of said cashier and myself, and that you shall receive in consideration of the foregoing from me a sum equal to one-half of my profits.

Very truly yours, JAS. BARTON KEY."

CHARLES F. DALY, a witness on behalf of the plaintiff, testified as follows:

That during the months of November and December, 1900, and January and February, 1901, he was barkeeper at the Barton hotel;

that he went to work there about November 22nd and
16 stayed until the receiver took hold of the property, about February 5th, 1901; that Mr. Scott first came to the hotel the latter part of November or first of December; perhaps stayed there two or three days, and was backwards and forwards, off and on, until the receivers took charge; that "Mr. Scott came in and I was introduced to him by Mr. Key as a partner:" that Mr. Scott spoke to Mr. Key in regard to different things about the hotel; gave his opinion regarding the paper, and things of that sort. Mr. Scott spoke to witness about the pictures in the bar not hanging as they should. Mr. Key gave witness instructions to give Mr. Scott whatever he desired from the bar. Mr. Key would give Mr. Scott an introduction to a gentleman as his partner. I have heard him lots of times. Mr. Scott told witness that he was to bring Mrs. Page over to act as cashier to handle the money and sign all the checks. Mrs. Page acted as cashier at the hotel, and took the receipts from the bar every night after Mr. Key had left the hotel. She carried the money upstairs to Mr. Scott.

On cross-examination the witness testified that he had accompanied Mrs. Page to Mr. Scott's room on one occasion when she had the bar money in the tin box.

On redirect examination the witness stated that after Mr. Key had left the hotel and gone to Baltimore Mr. Scott told him to continue at the hotel and he would see that everything went all right; that Mrs. Page would accept the money at night. He thought Mrs. Page came to the hotel about January, 1901.

(Mr. PRENTISS:)

Q. Did you ever have any conversation with Mr. Scott respecting his interest in the hotel, if any?

A. Only to look after it and do what I could for them in regard to business matters.

Q. Did he ever say to you what interest he had in the hotel, or what relation he bore to it?

A. No. He didn't make any statement of that sort.

Q. Did he ever tell you who the proprietor of the hotel was?

A. No, sir; he didn't.

Mr. Key left the hotel for Baltimore on the 2nd of February, 1901, which was a Saturday, and the receivers took charge of the hotel on the following Tuesday. Mr. Key came down to the bar and said
he was going. He shook hands with me and said good bye,
17 and that's all I saw of him.

On recross-examination the witness testified that he was employed in the hotel as a barkeeper by Mr. J. Barton Key on the 22nd day of November, 1900; that Mr. Key gave him all instructions with regard to the management of the bar and paid him a salary; that he had no conversation whatever with Mr. Scott until some time in December; on this occasion Mr. Scott was sitting in the bar and complimented him upon the nice appearance of the lunch counter, and made certain suggestions with respect to making

the bar look attractive. Other persons who dropped into the bar also complimented him and made suggestions to him, but he did not regard their compliments and suggestions as much as he did those coming from Mr. Scott, as he attached more weight to what Mr. Scott would say than to what Smith or Jones might say. Witness never received any money from Mr. Scott, and, apart from ordering him to straighten up some pictures hanging in the bar, never took any orders from him. Witness was introduced to Mrs. Page by the head bellman. Mr. Scott did not bring Mrs. Page in in order to introduce her to witness, though he remarked on one occasion when Mrs. Page was present, "This is my bar and this is my barkeeper." Witness understood that Mrs. Page was Mr. Scott's cousin. Mr. Scott remarked to him, "I am going to bring a cousin of mine over here; she is poor and she wants the position, and she is a nice woman, and I am going to put her in charge of my money and to sign all checks." Witness did not know what money Mr. Scott had or what checks he would have to sign about the hotel. Witness only knew that Mrs. Page was the person Mr. Scott referred to as his cousin, because James Robinson, Mr. Scott's colored valet, said so.

Thereupon attorney for the plaintiff introduced in evidence the bill of complaint filed in the supreme court of the District of Columbia, in equity cause No. 22044, wherein James P. Scott was complainant and James Barton Key was defendant, on the ground
18 that said bill of complaint contained an admission by Mr. Scott as to his relations with Mr. Key, said bill of complaint reading as follows:

"To the honorable the associate justice of the supreme court of the District of Columbia, holding an equity term:

Your complainant, James P. Scott, who sues in this action in his own right and in behalf of any and all other creditors of the above-named defendant, James Barton Key, who may seek relief by and contribute to the costs and expenses of these proceedings, respectfully shows:

1. Your complainant is a citizen of the United States and of the State of Pennsylvania, recently residing in Paris and at present temporarily sojourning in the city of Washington, in the District of Columbia.

The defendant, James Barton Key, is a citizen of the United States, having his domicile in the city of Baltimore, in the State of Maryland.

2. That some time in November, A. D. 1900, the defendant represented to your complainant that he was about to embark in the enterprise of keeping a hotel in the city of Washington, District of Columbia, and applied to this complainant for assistance in such regard, representing to your complainant that with such assistance as your complainant was able to and would extend to him the defendant would be able to secure a lease of the premises situated at 723 15th street northwest, in the city of Washington, formerly known as Welcker's hotel and later as the Hotel Wellington.

3. Your complainant, being impressed with the repre-
19 sentations made to him by said defendant, agreed, as re-
quested, to become surety for the prompt payment of the rent of said premises under the contemplated lease, and also to advance from time to time, as occasion might require, sums of money, not to exceed $5,000 in the aggregate, for the purpose of necessary repairs and improvements to be made in and about said premises, it being understood by and between your complainant and said defendant that the said sums of money so advanced should be repaid out of a rebate which was to be allowed by the lessor to the lessee, and that in consideration of your complainant becoming surety for the prompt payment of the rent as aforesaid and the advancements of said sums of cash, this complainant should be entitled, by his agent acting as treasurer or cashier, to handle all the receipts of said business, and to receive for his own use and benefit from the defendant one-half of the profits to be derived from the conduct of said business, it being further understood that, except as above set forth, your complainant was not to be identified with or concerned in the conduct of said enterprise.

4. On or about the 5th day of November, 1900, said defendant did enter into a lease of the premises in question with one Cecilia d'Andigna, acting through and by Henry May, her attorney-in-fact, which said lease granted to the defendant the use and occupation of the premises in question for a period of five years, to begin on the 1st day of December, 1900, the rent reserved being the sum of $7,500 per annum, payable monthly in advance at the rate of $625 per month, with a rebate to the lessee on account of improvements made and to
be made in and about said premises of the sum of $5,000,
20 to be deducted from the said rent reserved at the rate of $1,000
per annum; that, in accordance with the agreement above set forth, this complainant did become surety upon said lease for the prompt payment of the rent reserved and did further advance the said sum of $5,000 in cash to pay for the necessary improvements and repairs to said premises; that, notwithstanding your complainant had thus fully complied with his obligations under said agreement, he has, at the instance and request and as the result of the importunities of the defendant, advanced to said defendant, to be by him applied in the stocking and equipping of the premises in question and the preparation of the same for the reception of guests and for and on account of the conducting of the same as a hotel, further sums of money, aggregating, in addition to the sum of $5,000 above set forth, the further sum of about $3,000, making a total of cash advanced of about $8,000, and has also from time to time, at the instance and request of said defendant, endorsed said defendant's promissory notes in various sums, the total amount of said notes which have been discounted or otherwise disposed of by said defendant aggregating, as this complainant believes, approximately $2,000.

5. For the purpose of carrying on the business of a hotel in the premises aforesaid, extensive improvements and repairs both of the hotel property itself and of the contents thereof were made by the

said defendant, who used for such purposes in a large measure the cash furnished by your complainant above referred to. Your complainant is informed and believes, and therefore avers,
21 that, notwithstanding the large payment of cash on such accounts, that there *is* still due and owing from said defendant to builders and materialmen, to upholsterers and decorators, and to dealers in supplies of various sorts and kinds considerable sums of money, aggregating, as your complainant believes, the further sum of $10,000, and that many of said creditors insist upon immediate payment of the amount due to them.

6. Your complainant avers that some time during the month of December, 1900, the said premises, being in fit condition, were opened by said defendant as a hotel, under the name of "Barton's," and that since such opening it has, until the present time, been conducted by said defendant as a hotel, but notwithstanding the distinct agreement between defendant and your complainant that the latter, by his agent acting as treasurer or trustee, should handle the receipts of said business, the said defendant has not permitted the same to be done, nor has he at any time rendered to your complainant any account of the sums received in the course of such business, nor of the disposition made thereof, but, on the contrary, although often requested so to do, has refrained from making such accounting, and has kept this complainant in the dark as to the financial condition of said business.

8. Your complainant avers that said defendant has failed and neglected to pay out of said receipts the rent for said premises for the months of January and February, 1901, as will more fully appear from a letter this day received from J. V. N. Huyck, a real-estate broker having charge of the collection of said rents for the lessor, which said letter and its enclosure is hereto annexed,
22 made a part hereof, and marked "Exhibits A and B" respectively.

Complainant further avers that defendant has neglected for several weeks past to pay to the employés of said hotel their respective wages and has likewise neglected to pay to the market men and to supply men of various sorts the amounts which have become due and owing to them.

8. The complainant avers that the defendant is lacking in natural ability and unfit by training for the management of said business; that he is without means to defray the many obligations which he has incurred, is in a bad state of health, and has left this jurisdiction; that the hotel is without proper supplies requisite and necessary to enable the business to be further conducted; that the servants and employés are clamoring for their wages and the dealers in market and other supplies demand immediate payment; that the entrances and corridors of the building are obstructed by creditors clamoring for payment, and they are threatening immediate legal proceedings.

9. The complainant is informed and believes, and therefore causes the court to be informed, that the business of a hotel, if prop-

erly conducted in and upon the premises aforesaid, would by reason of the favorable location of said premises be lucrative and productive of much profit; that if attachments and other processes at law can be levied upon the said premises and contents thereof at the instance of warring creditors in a race of diligence the said property and all the value that may be therein will be dissipated and wasted to the great detriment not only of your complainant but of all other creditors who may have claims against the same.

23 Wherefore, for the purpose of preserving the said property and business, and for the purpose of having the said business temporarily, at least, conducted in a proper and businesslike manner, and for the preservation of the assets of said defendant for the benefit of all creditors who may seek to avail themselves of the relief afforded by this bill, your complainant prays that a receiver may be appointed, who shall forthwith take possession of said premises and of the leasehold interest of the defendant therein and of all of the contents of said premises, by whatever name and description the same may be designated, and to hold the same until the further order of this court, and to continue the said business upon such terms and upon such directions as this honorable court may from time to time devise and give, and ultimately to wind up the said business and to make such sale or other disposition of the said leasehold interest in said premises and of the business conducted therein and of the assets and properties belonging to said defendant and found upon said premises as this honorable court shall direct.

To the end, therefore, that said defendant may be restrained and enjoined from disposing of the said leasehold interest in said premises, or of any interest therein, and may be further restrained and enjoined from disposing of any of the assets of said business or contents of the premises aforesaid, and that said defendant may render an accounting to your complainant, and for such — and other relief as to this honorable court may seem proper, your complainant prays that a gracious writ of subpœna may be issued out of this hon-

24 orable court, addressed to this defendant, James Barton Key, requiring and commanding him to appear herein at a day to be fixed by this court to show cause why he should not be perpetually enjoined and restrained and why a receiver should not be appointed as prayed.

And complainant will ever pray, &c., &c., &c.

JAMES P. SCOTT,
Solicitor for Complainant.

F. D. McKENNEY,
J. S. FLANNERY,
Solicitors for Complainant.

DISTRICT OF COLUMBIA, *ss:*

I, James P. Scott, being first duly sworn, do depose and say that I have read over the foregoing and annexed bill of complaint and know the contents thereof, and that the statements therein contained

made of my own knowledge are true, and those made upon information and belief I believe to be true.

JAMES P. SCOTT.

Subscribed and sworn to before me this 4th day of February, A. D. 1901.

AYLETT T. HOLTZMAN,
[SEAL.] *Notary Public, D. C.*"

F. W. DAW, a witness on behalf of the plaintiff, testified that he has been for three or four years last past a paper-hanger and decorator; that up to the 28th day of February, 1901, he was a member of the firm of Daw & Dickson. At present he is engaged in business on his own behalf; that he did work in the Hotel Barton in the latter part of November, 1900; that his contract for such work was made with Mr. Key; that he never saw Mr. Scott except
25 on one occasion when he was showing Mr. Key some samples of wall-paper, and a gentleman came into the room; Mr. Key introduced this gentleman to him in the following words: "Mr. Daw, this is Mr. Scott, my backer; Mr. Scott, this is Mr. Daw, our paper-hanger." Witness went on showing the samples of paper, and the gentleman who had been introduced as Mr. Scott presently said, "Jim, I don't like that paper. I would sooner have that paper," mentioning some other paper witness was showing him at the time; witness does not recollect whether Mr. Scott took any further part in the selection of the papers or not.

JAMES BARTON KEY, being called as a witness on behalf of the plaintiff, testified that he is one of the defendants in this case; that the letter heretofore introduced in evidence from himself to Mr. Scott was taken by him to Mr. Scott's room by witness and left on Mr. Scott's bureau; witness told Mr. Scott that it was a letter regarding the proposition he had made to Scott for the loan of money; Mr. Scott never had any further conversation with witness about the letter, but he went on his bond to secure the rent of the hotel and advanced the money; at the time of opening the hotel witness was without means, and the hotel was opened entirely on the money loaned to witness by Scott; that about February of the following year Mr. Scott and witness had a falling out. Scott demanded of witness to know what he (witness) was going to do in order to secure Scott the money that he had loaned to witness; at the same time Scott said he wanted to know whether, provided he got some
26 experienced hotel man who could do better with it, witness was willing to let him take witness' place, and said he had one who was willing to come in; he also said that he thought it would be a good idea to have some man more experienced in the hotel business than was witness in charge of the hotel as manager; witness declined to assent to such suggestion.

(Mr. PRENTISS:)

Q. As a matter of fact, did he not demand that you should sign over the lease and get out?

A. He did not.

Q. Just state what his demand was.

A. As nearly as I can recollect, he thought it would be a good idea to have some man more experienced in the hotel business in there. He was still willing that I should be there and retain some interest, which we could agree upon in some way or other. If this other man was willing to come in and take my place, he was willing to accept it, provided I would give him the direction of matters; and I declined to agree to it.

* * * * * * *

(Mr. PRENTISS:)

Q. Do you recollect talking with Mr. Clarke, about that time after you had some words with Mr. Scott?

A. I saw Mr. Clarke a great many times.

Q. You and your counsel were both given notice to produce a letter frrom Mr. Scott, referred to in a conversation that you had with him. Have you that letter?

A. No, sir, I have no such letter.

Q. You say you have not such a letter now?

A. No; there was no such letter in existence. It was a letter—I spoke to Mr. Clarke about a little scrap of paper written about some friends of his who got some rooms that were freshly painted. He heard of it and wrote me a little note about it—somebody that he had recommended to come down there—some Philadelphia people.

Q. That was the note you referred to in your conversation with Mr. Clarke?

A. Yes.

Q. Have you that little slip?

A. No, I have not; I didn't keep it.

Q. That, I believe, was signed "Your partner, James P. Scott"?

A. No, it was not signed that way. There was some allusion to partner, but it was not signed "Your partner, James P. Scott." I forget just how it was signed, but it was something about "partner." It used the word partner, but it was not signed that way. It was written in a paragraph right through. It was not signed as partner. He said that we had been talking about having a very precise and nice hotel, and all that, and he wrote to say that he thought this was not quite the idea of running a hotel on the style of the Bellevue, to have people who came there put into rooms that were freshly painted. I forget just how it was worded.

The witness having produced the guests' register of the Hotel Barton, pursuant to notice served upon him by the attorney for the plaintiff, stated that Mr. Scott's name did not appear anywhere upon said register, nor upon the transient guests' ledger.

27

Thereupon, upon cross-examination, the witness testified that Mr. Scott came to the Hotel Barton at his request and as his guest a few days before the hotel was opened for the reception of guests. At the time of the opening of the hotel Mr. Scott was sick and confined

to his room, and witness reserved the first line on the guests' register for the registration of Mr. Scott's name, saying to the first man who registered to "leave a place for my first guest, Mr. Scott, at the top of the page." Witness invited Mr. Scott to stop at the Hotel Barton during the opening, so far as his rooms were concerned, as witness' guest. Mr. Scott paid cash for everything he got in the restaurant and at the bar until witness told him not to pay cash, but to sign regular charge checks, which could be kept together and the amount thereof could be charged against the money which witness owed to him. This was done for a long time. These checks so signed by Mr. Scott were kept by witness until he left the hotel, just before the receivers took charge. Witness does not know what has become of them since. The letter introduced in evidence expresses the relationship between Mr. Scott and himself with respect to the business of the hotel, and their relations in that regard were not otherwise than as expressed in said letter. With respect to the clause in the letter to the effect that "the finances of the hotel shall be handled by a treasurer and cashier to be appointed and approved by you," witness testified that a lady, Mrs. Page, was brought on from New York, but she never went
28 actually to work, because the books were being prepared for her by an expert book-keeper; that she never took hold of any of the business of the hotel. Until witness went away she had never handled any money of the hotel. Witness left the hotel the first Saturday in February, and went to Baltimore to spend Sunday. He was taken sick while there, and on the next day was compelled to go to a hospital for medical aid, and did not return to Washington until the following Monday week. With respect to the clause of the letter to the effect that "all payments shall be made only on the joint checks of said cashier and myself" (meaning witness), witness states that no payments were made on such joint checks; that he, witness, signed all checks individually; that there were no profits received by him at any time from the business.

Attorney for plaintiff thereupon read in evidence a letter from James P. Scott to W. B. Moses and Sons in the following words and figures:

"J. Barton Key, prop.—Barton's, formerly Welcker's, on the European plan.

Tel. 2557.

WASHINGTON, D. C., *December 22nd*, 1900.

W. B. Moses, 11th & F Sts. N. W., city.

GENTLEMEN: Mr. James Barton Key, with whom I am financially interested in the rebuilding and refitting of Barton's new hotel, formerly the Wellington, informs me that he is about to pur-
29 chase from you a bill of goods consisting of carpets, rugs and various other house-furnishing materials, which bill will amount to something between eight hundred and fifteen hundred dollars, and Mr. Key tells me that he has arranged with you to pay

you one-quarter of the amount of the bill in cash, on which account he has already paid you $250.00, and for the balance he is to give you three equal payments in notes endorsed by me at 30 days, 60 days and 90 days, dating January 15th.

I write this to say to you that when the goods are delivered and the notes are prepared by your firm and Mr. Key, I will, as requested by Mr. Key, endorse the same.

Very truly yours, JAMES P. SCOTT."

Thereupon JAMES BARTON KEY, being recalled for further cross-examination, produced a ledger belonging to the Hotel Barton, and stated that the same was the first ledger used in that hotel; that said ledger contained an account with James P. Scott, in which he was charged with cash items beginning on the 12th day of December, 1900, and from time to time until January 28th; that the charges made against Mr. Scott, and appearing upon said ledger, amounted to $281.91.

Thereupon, the attorney for the plaintiff having announced the testimony on behalf of the plaintiff closed, the attorney for the defendant Scott moved the court to direct the jury to return a verdict in favor of the defendant Scott; which motion was granted by the court and an announcement made by the court in the following words: "I shall direct the jury, when I come to charge them in this case, to return a verdict for Scott."

30 Thereupon the attorney for the defendant Key moved the court to direct the jury to return a verdict in favor of the defendant Key also, on the ground that the suit of the plaintiff was against the defendants Key and Scott as copartners, and it appearing from the proof as declared by the court that no copartnership existed between the defendants, therefore no judgment could be rendered against the defendant Key in the pending proceedings; which motion the court overruled, and to which action of the court the attorney for the defendant Key then and there duly excepted, and such exception was noted upon the minutes of the trial justice.

Thereupon the court instructed the jury as follows:

"GENTLEMEN OF THE JURY: In view of the conclusion reached by the court as the legal effect of the testimony which has been submitted to you, the court instructs you in this case to return a verdict for the defendant Scott and against the defendant Key. The undisputed facts make it proper that that character of verdict should be rendered. Your verdict should be in favor of the plaintiff Roberts against the defendant Key for $196 30."

Mr. BLAIR: "I reserve an exception to the instructions of the court. It seems to me that in this particular case we are entitled to a special finding by the jury that there is no partnership in this case."

The COURT: "It seems to me that you find your ground of
31 exception in my instruction to the jury. I have in effect told the jury that the court finds as matter of law that from

the undisputed facts in the case there is no partnership; and therefore I have instructed the jury to return a verdict in favor of the defendant Scott on that ground. I do not see why there should be a special verdict."

Mr. BLAIR: "We think that is sufficient, and if put in that form we have no objection to it."

Mr. MCKENNEY: "I think the instruction should be that, it appearing from the undisputed evidence in this case that there was no partnership relation between the defendants to this action, the verdict of the jury upon the pleadings and proof should be for the defendants."

The court having further instructed the jury to return a verdict for the defendant James P. Scott, and also to return its verdict in favor of the plaintiff against the defendant James Barton Key in the sum of $196.30, the attorney for the defendant James Barton Key noted an exception to the ruling of the court, in so far as it directed the jury to return a verdict in favor of the plaintiff and against said defendant Key for the sum mentioned, both of which exceptions were duly entered upon the minutes of the trial justice before the jury returned its verdict in accordance with the court's instruction.

Be it further remembered that the foregoing was all of the evidence tendered in the above cause in the course of the trial,
32 and that the separate and several exceptions taken by counsel, as hereinbefore set forth, were taken before the rendition of the verdict herein.

Wherefore the attorney for the defendant James Barton Key then and there prayed the court and now prays the court to sign and seal this his bill of exceptions, and the attorney for the plaintiff Roberts objects to the signing and sealing of the same upon the ground that there is no right of appeal allowed by law from the judgment of this court in this cause; which objection being overruled by the court and an exception to such action being first duly noted, this bill of exceptions is accordingly signed and sealed this 28th day of April, A. D. 1902.

T. H. ANDERSON, [SEAL.]
Associate Justice.

Settled by counsel this 28th day of April, 1902—
HENRY P. BLAIR,
Attorney for Defendant Key,
F. D. MCKENNEY,
Attorney for Defendant Scott,
W. C. PRENTISS,
Attorney for Plaintiff,

without prejudice to objection noted above.

33 *Motion to Extend Time for Filing Record.*

Filed April 29, 1902.

In the Supreme Court of the District of Columbia, the 29th Day of April, A. D. 1902.

WILLIAM F. ROBERTS, Plaintiff,
vs.
J. S. BARTON KEY and JAMES P. SCOTT, Co-partners, Defendants. } At Law. No. 44625.

Now comes the defendant J. S. Barton Key, above named, and moves this honorable court to extend the time for filing the record on appeal in the Court of Appeals of the District of Columbia for thirty (30) days from this date, and as ground for such motion respectfully shows that it has been impossible to prepare the record in this cause up to this time, pending the settlement of the bill of exceptions herein.

H. P. BLAIR,
Attorney for Defendant J. S. Barton Key.

Order Extending Time to File Record.

Filed April 29, 1902.

In the Supreme Court of the District of Columbia, the 29th Day of April, A. D. 1902.

WILLIAM F. ROBERTS, Plaintiff,
vs.
J. S. BARTON KEY and JAMES P. SCOTT, Co-partners, Defendants. } At Law. No. 44625.

34 Upon consideration of the motion of the defendant J. S. Barton Key, heretofore filed herein, it is, this 29th day of April, A. D. 1902, ordered that the time for filing the transcript of record on appeal in the above-entitled cause be, and the same is hereby, extended for thirty (30) days from this date.

T. H. ANDERSON,
Associate Justice, D. C.

Directions to Clerk for Preparation of Record.

Filed May 5, 1902.

In the Supreme Court of the District of Columbia, the 5th Day of May, 1902.

ROBERTS vs. KEY. } At Law. No. 44625.

The clerk of said court will copy in the transcript of record for the Court of Appeals the following:

Original writs issued by the justice of the peace;

Itemized bill of W. F. Roberts, showing pencil-marks therein;

Certificate of proceedings before justice of the peace, and make a memorandum showing the appeal to the S. C. D. C., trial, verdict, judgment in S. C. D. C., and appeal to Ct. of Appeals & bond.

HENRY P. BLAIR,
Att'y for J. S. Barton Key, Appellant.

35 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } ss:

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 34, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 44625, at law, wherein William F. Roberts is plaintiff and James S. Barton Key *et al.* are defendants, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 12th day of May, A. D. 1902.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1220. James S. Barton Key, appellant, *vs.* William F. Roberts. Court of Appeals, District of Columbia. Filed May 14, 1902. Robert Willett, clerk.

36 In the Court of Appeals.

JAMES S. BARTON KEY, Appellant,
vs.
WILLIAM F. ROBERTS. } No. 1220, April Term, 1902.

Now comes the appellee by his attorney and showing to the court that the appellant's appeal herein is from a joint judgment against him and the United States Fidelity and Guaranty Company rendered by the supreme court of the District of Columbia in a cause pending therein on appeal from a judgment of a justice of the peace, moves the court to dismiss the said appeal to this court, for the reasons:

First. That the appeal is defective in not joining the said United States Fidelity and Guaranty Company as appellant and no proceeding by way of summons and severance having been had.

Second. That this court has no jurisdiction on appeal from a judgment of the court below in such cases.

W. C. PRENTISS,
Attorney for Appellee.

(Endorsed:) No. 1220. Court of Appeals, D. C., April term, 1902. James S. Barton Key, appellant, *vs.* Wm. F. Roberts. Motion of appellee to dismiss appeal. Court of Appeals, District of Columbia. Filed Jun- 3, 1902. Robert Willett, clerk.

37 THURSDAY, *June 5th, A. D.* 1902.

JAMES S. BARTON KEY, Appellant,
vs.
WILLIAM F. ROBERTS. } No. 1220.

The motion to dismiss the appeal in the above-entitled cause was submitted to the consideration of the court by Mr. W. C. Prentiss in support of motion, and leave is hereby granted him to file brief in cause No. 1199 on motion to dismiss.

38 JAMES S. BARTON KEY, Appellant,
vs.
WILLIAM F. ROBERTS. } No. 1220.

(Mr. Chief Justice ALVEY delivered the opinion of the court:)

The motion to dismiss the appeal in this case must prevail. The action was originally brought before a justice of the peace of this District to recover the sum of $196.30. The case was regularly tried by the justice of the peace, and a judgment was rendered for the plaintiff, and the defendants appealed to the supreme court of the District, where the appeal was tried *de novo* before a jury. The trial resulted in a verdict and judgment in favor of the plaintiff against one of the defendants, but in favor of Scott, the other defendant; and the defendant Key has appealed to this court.

This motion to dismiss is controlled and must abide the decision just made by this court in the case of *Groff vs. Miller*, in which it is held that section 82 of the new Code is in full force and operation, and not nullified by section 226 of the Code. The appeal must therefore be dismissed, *and it is so ordered.*

Appeal dismissed.

39 TUESDAY, *June 24th, A. D.* 1902.

JAMES S. BARTON KEY, Appellant,
vs.
WILLIAM F. ROBERTS. } No. 1220, April Term, 1902.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the supreme court of the District of Columbia, and on a motion to dismiss which was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that this cause be, and the same is hereby, dismissed with costs, for the want of jurisdiction.

Per MR. CHIEF JUSTICE ALVEY.

June 24, 1902.

40 Court of Appeals, District of Columbia, April Term, A. D. 1902.

JAMES S. BARTON KEY, Appellant,
vs.
WILLIAM F. ROBERTS, Appellee. } No. 1220.

Appeal from the supreme court of the District of Columbia.

Motion to Set Aside Judgment and Grant a Rehearing Herein.

Now comes J. S. Barton Key, by his attorneys, and respectfully moves this honorable court to set aside the judgment heretofore rendered herein on motion to dismiss this cause and to grant a reconsideration thereof, and as ground of such motion respectfully shows that this honorable court dismissed the appeal in this cause for want of jurisdiction, on the authority of its decision in the case of Groff *vs.* Miller, No. 1199, said decision turning upon the construction placed by this honorable court upon the conflicting provis-
41 ions of sections 82 and 226 of the Code of Laws for the District of Columbia, the court holding that the reasonable interpretation of such conflicting provisions necessitated the conclusion that this court had jurisdiction to hear and determine cases originating before justices of the peace only where said causes had been moved into the supreme court of the District of Columbia from the justice of the peace by certiorari and not by appeal.

By an act "To amend an act entitled 'An act to establish a Code of Law for the District of Columbia,'" which became a law on the

1st day of July, 1902, the Congress expressly provided that the Code of Law for the District of Columbia should be amended in the following particulars:

1. By striking out the whole of section 82;

2. By striking out the quotation marks in the third and fourth lines of section 226;

The effect of such amendments being to strike out the provision heretofore occurring in the Code to the effect that:

"In no case appealed from a justice of the peace shall there be a further appeal from the judgment of the supreme court,"

and leaving the positive law upon this subject as follows:

"Any party aggrieved by any final order, judgment or decree of the supreme court of the District of Columbia or of any justice thereof, including any final order or judgment in any case heard on appeal from a justice of the peace, may appeal therefrom to the said Court of Appeals and upon such appeal the Court of Appeals shall review such order, judgment or decree, and affirm, reverse or modify the same, as shall be just, except as provided in the following sections * * *."

Such amendments by the Congress in the manner and form in which they were made must be regarded as a legislative in-
42 terpretation by the Congress itself of its purposes and intentions respecting the conflicting provisions covering appeals from justices of the peace, as the same heretofore appeared in the Code, and must reasonably be taken as an express declaration by Congress that it was its intention, as expressed in former section 226 of the Code, to permit an appeal to the Court of Appeals from the judgment of the supreme court of the District in any and all cases appealed to said supreme court from a justice of the peace, thereby including in the privilege of appeal, as seems only natural and proper, cases technically appealed from justices of the peace as well as those removed into the supreme court by certiorari.

In view of this express declaration, it is respectfully submitted that the right intended to be conferred by Congress, as declared in the amendments, should not be denied to the appellant in this case, but that he should be permitted to have the benefit of the judgment of this court upon a question of general moment and of considerable gravity to himself.

Had this case been permitted to come before this honorable court in its regular order, there is no doubt that the appellant would have been accorded the full benefit to be derived from the amendments to the Code above referred to; and as the case is still within the control of the court, it is respectfully submitted that the summary proceedings on motion to dismiss should not be permitted to deny a right so expressly conferred.

HENRY P. BLAIR,
FREDERIC D. McKENNEY,
J. S. FLANNERY,
Attorneys for Appellant.

43

JAMES S. BARTON KEY
vs.
WILLIAM F. ROBERTS. } No. 1220.

Motion for rehearing of motion to dismiss appeal.

Mr. Chief Justice ALVEY delivered the opinion of the court:

For the same reasons that the motion for rehearing was overruled in the case of *Groff vs. Miller*, the motion in this case is overruled—the ground of the motions in both cases being the same.

Motion for rehearing overruled.

44

WEDNESDAY, *October 15th, A. D.* 1902.

JAMES S. BARTON KEY, Appellant,
vs.
WILLIAM F. ROBERTS. } No. 1220, October Term, 1902.

On consideration of the appellant's motion for a rehearing in the above-entitled cause, it is by the court now here ordered that said motion be, and the same is hereby, overruled with costs.

Per MR. CHIEF JUSTICE ALVEY.

October 15, 1902.

45

Court of Appeals, D. C.

J. S. BARTON KEY, Appellant,
vs.
W. F. ROBERTS. } No. 1220, Oct. Term, 1902.

OCTOBER 23, 1902.

SIR: In making up the transcript of the record in the above case for use in the Supreme Court of the United States please include therein a transcript of all proceedings had in the Court of Appeals, together with copies of the opinion of the court delivered by Mr. Chief Justice Alvey in the case of Groff *vs.* Miller, No. 1199, on June 23, 1902, and October 15, 1902.

HENRY P. BLAIR,
F. D. McKENNEY,
Attorneys for J. S. Barton Key.

To Robert Willett, Esqr., clerk Court of Appeals, D. C.

(Endorsed:) No. 1220. James S. Barton Key, appellant *vs.* William F. Roberts. Directions to clerk for preparation of transcript. Court of Appeals, District of Columbia. Filed Oct. 23, 1902. Robert Willett, clerk.

46 DILLER B. GROFF, Appellant, v. FRANCIS MILLER. } No. 1199.

(Filed June 23, 1902.)

(Mr. Chief Justice ALVEY delivered the opinion of the court:)

In this case there is a motion entered to dismiss the appeal, upon the ground that there is no jurisdiction in this court to hear and decide the case.

The case was instituted before a justice of the peace by whom it was tried and determined, and a judgment was rendered for the plaintiff. From that judgment an appeal was taken by the defendant to the supreme court of this District, where, after trial *de novo* before a jury, a judgment was rendered in favor of the plaintiff for $96.55, and from which judgment the defendant has taken an appeal to this court. The plaintiff in the judgment contends that the appeal to and determination by the supreme court of the District is final, and that there can be no further appeal to this court. If that contention be well founded, of course, this appeal must be dismissed.

The determination of this motion to dismiss involves a question of the proper construction of several of the sections of the new Code enacted by Congress for this District; the sections involved being those relating to civil actions instituted before justices of the peace, and appeals therefrom. The act of Congress of March 3, 1901, ch. 854 (31 St. p. 1189) is entitled "An act to establish a code of law for the District of Columbia," and whereby it is declared "That the following is hereby enacted and declared to be a code of law for the District of Columbia, to go into effect and operation from and after the first day of January, in the year 1902." The code thus enacted is divided into chapters, with many subdivisions and titles,
47 to embrace the contents of the entire enactment.

In chapter 1 of this Code, under title, *justices of the peace*, there are several sections that have more or less bearing upon the question presented. They are as follows:

"SECTION 7. Jury trials.—Trial by jury before justices of the peace is hereby abolished."

Section 8 provides, "That in all cases of *concurrent jurisdiction* the *defendant* may remove the case for trial into the supreme court of the District by a writ of *certiorari* (to be awarded by said cou[illegible] one of the justices thereof, upon a petition under oath, the form and substance whereof shall be prescribed by said court)."

"SECTION 9. Jurisdiction.—The said justices of the peace shall have jurisdiction in all civil cases in which the amount claimed to be due for debt or damages arising out of contracts, expressed or implied, or damages for wrongs or injuries to persons or property, does not exceed three hundred dollars, * * * and said jurisdiction shall be exclusive when the amount claimed for debt or damages, or the value of personal property claimed does not exceed fifty dollars, and *concurrent* with the said supreme court when it exceeds fifty dollars.'

"SECTION 30. Appeal.—Where the debt or demand, or the value o

personal property claimed, exceeds five dollars, and in actions for the recovery of possession of real estate, as aforesaid, either party who may think himself aggrieved by the judgment or other final order of a justice of the peace, may appeal to the supreme court of the District."

Under title, Supreme Court of the District of Columbia, it is provided by—

"SECTION 80. That on such appeal, the circuit court shall, in a summary way, hear the case *de novo* upon the proofs and allegations of the parties and determine the same according to the law and the equity and the right of the matter; but either party may demand a trial by jury."

48 "SECTION 82. In *no case appealed* from a justice of the peace shall there be *any further appeal* from the judgment of the circuit court." This is clear and positive.

But under title, Court of Appeals, occurs this provision:

"SECTION 226. Jurisdiction.—Any party aggrieved by any final order, judgment, or decree of the supreme court of the District of Columbia, or of any justice thereof, 'including any final order or judgment in any case heard on appeal from a justice of the peace,' may appeal therefrom to the said Court of Appeals;" and upon such appeal, &c.

These are all the provisions that would appear to have any relation to the question under consideration; and from them it would appear that there is difficulty in reconciling and making consistent section 82 with the provision contained in section 226, if we adhere strictly to the literal terms employed in the latter section. Indeed, it is clear, both provisions, according to the strict letter of the statute, will not stand together; one must yield and become a nullity in order to give the other effect, if we adopt the literal meaning of the terms employed in section 226. Congress certainly did not intend to produce any such result in the enactment of these provisions, but, on the contrary, intended each provision to have effect. We think, however, the apparent conflict and difficulty, growing out of the language employed in section 226, may be removed, and the sections reconciled and made consistent, by the application of a few well-established rules of construction of statutes.

In the first place, these provisions of the Code must be construed in the light of the pre-existing law, the reason of the matter, and also in view of the consequences that would be produced by adopting the contention of the appellant; that is to say, that the provision of section 226, being the later provision of the Code, should prevail, to the exclusion of the positive provision contained in section 82. This theory of the last expression of the legislature is the only argument that has been or can be invoked in support of the contention of the appellant. By that argument, the provision

49 so clearly and positively expressed by section 82 is utterly nullified, as if it were no part of the Code. Was this the intention of Congress, and should such be the construction? Why thus nullify and strike out section 82, in order to give force and literal effect to the provision contained in section 226? While

there may be some cases found that give countenance to such contention, yet the decided weight of decision is, that such construction should never be adopted except upon the most urgent and irresistible reason. It would seem to be well settled that a code, or body of revised laws, should be regarded as a system of contemporaneous acts, as established *uno flatu;* or as a simultaneous expression of the lawmaker. Its various sections relating to the same subject should, if practicable, be construed together, as one; as one act or chapter, or as continuous sections of the same act; and one chapter is to be read with another, relating to the same subject, as one body of law, though collected from independent laws of previous enactment, originally passed at different times and re-enacted by a revisory act. If possible, the various portions of such code or revision must be so construed as to harmonize with one another. Its general system of legislation upon the subject-matter should be taken into view, and any particular article construed in conformity therewith, unless an intention to depart from it be clearly shown; and definitions contained in it are to be construed with reference to its positive enactments *in pari materia.* Endlich, on Inter. of Sts. sec. 40, and cases there cited.

It is an established rule in the exposition of statutes, says Chancellor Kent, "that the intention of the lawgiver is to be deduced from a view of the whole, and of every part of a statute, taken and compared together. The real intention, when accurately ascertained, will always prevail over the literal sense of the terms. When the expression in a statute is special or particular, but the reason is general, the expression should be deemed general. *Scire leges, non hoc est verba earum tenere sed vim ac potestatem,* and the reason and intention of the lawgiver will control the strict letter of the law, when the latter would lead to palpable injustice, contradiction, and absurdity." 1 Kent Com. 461–'2. And as illustrative of this principle of construction, it is stated by the same learned author, that a saving clause in a statute will be rejected, when it is directly repugnant to the purview or body of the act, and could not stand without rendering the act inconsistent and destructive of itself. *Ib.*

And so it is an established rule, that where words are obscure or doubtful, the intention of the legislature is to be resorted to in order to find the meaning of the words as employed in the statute. A thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute, is not within the statute unless it be within the intention of the makers of it. *People vs. Utica Ins. Co.*, 15 John., 358, 380. And so therefore, that which is within the letter of the statute, may sometimes not be within the statute, not being within the intention of the makers. "If laws and statutes seem contrary to one another, yet if by interpretation they may stand together, they shall stand;" and where two laws only so far disagree or differ, as that by any other construction they may both stand together, the rule that *Leges posteriores, priores contrarias abrogant,* does not apply, and the latter is no repeal of the former.

Roll. Rep. 90, 91; *2d Co. Rep.* 5, 6; *19th Vin. Abs.* 519, 525; *4 Gill & John.*, 152, *Canal Co. vs. Railroad Co.*

The rule is very clearly stated by Mr. Chief Justice Fuller, speaking for the Supreme Court, in the case of *Petri vs. Commercial Bank*, 142 U. S., 644, 650. In that case, he said: "The rule that every clause in a statute should have effect, and one portion should not be placed in antagonism to another, is well settled; and it is also held that it is the duty of the court to ascertain the meaning of the legislature from the words used and the subject-matter to which
51 the statute relates, and to restrain its operation within narrower limits than its words import, if the court is satisfied that the literal meaning of its language would extend to cases which the legislature never intended to include in it." See also case of *Bennier vs. Bennier*, 147 U. S. 246.

It is difficult to suppose that it was ever the intention of Congress, by the adoption of section 226 of the Code, to give the right of appeal to this court in all cases of appeal from justices of the peace to the supreme court of this District; even though the amount in controversy barely exceeded five dollars. Yet the words employed in the section, if taken literally, would seem to confer the right. Where the demand in controversy exceeds fifty and does not exceed three hundred dollars, the suit therefor- may be brought either before a justice of the peace or in the supreme court of the District, and if brought before a justice of the peace, the *defendant* may remove the case to the supreme court of the District by *certiorari* for trial in the first instance, or he may have a trial before the justice of the peace, from whose judgment either party may appeal to the supreme court of the District. If the case be removed into the supreme court by *certiorari*, and be there tried, and judgment rendered, then either party may appeal to this court. If the words in section 226, instead of being read as applying to appeals strictly as such from justices of the peace, be read as applying to final orders or judgments in any case heard on return of *certiorari* by or from a justice of the peace, the apparently conflicting provisions of sections 82 and 226 would be made to harmonize and be rendered consistent, the one with the other, and would consist throughout with the general scheme of the statute relating to civil actions brought before justices of the peace. And this, we think, is the fair and rational construction to be placed upon the terms employed in section 226; as thereby all the provisions of the Code relating to this subject are given full effect and operation, and none rendered null and
of non-effect, by reason of the apparent conflict between
52 sections 82 and 226, such as would be the case if the contention of the present appellant were sustained. We know that, in popular understanding, the proceeding by *certiorari* is regarded as in its nature an appellate proceeding, and in many jurisdictions it is made so in reality. Considering the entire subject, and all the provisions of the Code relating thereto, we think it a reasonable inference that the proceeding referred to in section 226, as originating with and coming from a justice of the peace into the Sapreme Court for trial and judgment, is the proceeding authorized to be brought

therein by *certiorari*, and not technically an appeal. By this construction, effect is given to the provision incorporated in section 226, and section 82 is allowed to stand and have operation, whereby it is declared, in accordance with the pre-existing law, that "in no case appealed from a justice of the peace shall there be any further appeal from the judgment of the circuit court."

This being our conclusion, it follows that this appeal is improperly here, and it must therefore be dismissed; *and it is so ordered.*

Appeal dismissed.

53 DILLER B. GROFF *vs.* FRANCIS MILLER. } No. 1199.

(Filed October 15, 1902.)

Motion for rehearing on motion to dismiss appeal.

Mr. Chief Justice ALVEY delivered the opinion of the court:

There is a motion made in this case for rehearing on motion to dismiss appeal, and which is founded upon the recent act of Congress of June 30, 1902, providing various amendments to the District Code. By this amendatory act sections 81 and 82 of the Code are repealed, without substituting any other provisions in their stead; and it is supposed that this is a congressional construction of section 226 of the Code, to the effect that the right of appeal was intended to be secured to this court from the supreme court of the District from any final order or judgment in any case heard on appeal from a justice of the peace. In disposing of the motion to dismiss the appeal in this case, we so construed the apparently conflicting sections 82 and 226 of the Code as to give effect to both sections, as we were required to do by established canons of construction. The Code was adopted as an entirety, and as a single legislative act, and no one part or section of it could in reason be said to be the last expression of legislative will. If in the amendatory and repealing act, passed after the appeal was disposed of by this court, congressional construction is to be accepted as to the meaning originally intended by section 226, then the fact that it was deemed necessary to repeal section 82, in order to give force and effect to section 226, it would follow that while both sections remained unrepealed they neutralised and frustrated each other, and neither could be allowed effective operation. This would leave the law as it existed prior to the adoption of the Code in full force, that is to say without any effect-

54 ive statutory right of appeal to this court, in cases like the present; and that being the case, the appeal taken in this case could not be sustained. In any aspect, therefore, this appeal would have to be dismissed.

Motion for rehearing overruled.

55 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 54 inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals (together with a copy of the opinion of said court in Groff *vs.* Miller, No. 1199) in the case of James S. Barton Key, appellant, *vs.* William F. Roberts, No. 1220, October term, 1902, as the same remain upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 26th day of November, A. D. 1902.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

[redacted]

TRANSCRIPT OF RECORD.

Court of Appeals, District of Columbia

[redacted]

[redacted]

JAMES S. EASTON KEY, APPELLANT,

vs.

WILLIAM F. ROBERTS.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

[redacted]

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

APRIL TERM, 1902.

No. 1220.

JAMES S. BARTON KEY, APPELLANT,

vs.

WILLIAM F. ROBERTS.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MAY 23, 1902.

In the Court of Appeals of the District of Columbia.

JAMES S. BARTON KEY, Appellant,
vs.
WILLIAM F. ROBERTS. } No. 1220.

a Supreme Court of the District of Columbia.

WILLIAM F. ROBERTS, Plaintiff,
vs.
JAMES S. BARTON KEY and JAMES P. SCOTT, Copartners, Defendants. } No. 44625. At Law.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Writ.*

Filed April 18, 1902.

44625.

DISTRICT OF COLUMBIA, *ss:*

The President of the United States to Aulick Palmer, U. S. marshal, Greeting:

Summon J. S. Barton Key and James P. Scott, copartners, to be and to appear before me, the subscriber, a justice of the peace in and for the District aforesaid, on the 9th day of Feb., A. D. 1901, at 10 o'clock a. m., to answer unto the complaint of William F. Roberts in a plea of debt of $196.30.

Given under my hand and seal this 5th day of Feb., A. D. 1901.

A. S. TAYLOR, *J. P.* [SEAL.]

Marshal's Return.

8th day of Feb'y, 1901, personally summoned as within directed as to James P. Scott.

AULICK PALMER,
U. S. Marshal.

2 *Writ.*

Filed April 18, 1901.

44625.

DISTRICT OF COLUMBIA, ss:

The President of the United States to C. V. Mallet or any qualified constable, Greeting:

Summon J. S. Barton Key and James P. Scott, copartners, to be and to appear before me, the subscriber, a justice of the peace in and for the District aforesaid, on the 9 day of Feb., A. D. 1901, at 10 o'clock a. m., to answer unto the complaint of William F. Roberts in a plea of debt of $196.30.

Given under my hand and seal this 5 day of Feb., A. D. 1901.

A. S. TAYLOR, *J. P.* [SEAL.]

Constable's Return.

FEB. 13TH, 1901.

Summoned as within directed as to J. S. Barton Key.

CHARLES V. MALLET, *Constable.*

3 *Itemized Bill of W. F. Roberts.*

Filed April 18, 1901.

J. S. Barton Key [and James P. Scott, copartners]* Dr., to W. F. Roberts, 730 15th street, Washington city. 44625.

1900.				
Dec. 1	To 200 letter & 200 ½ letter hdgs	3 50		
7	" 200 wine cards	1 50		
11	" 500 envelopes	2 50		
13	" sketch of arms	1 25		
15	" 1000 letter-headings	5 50		
	" 1000 ½ letter-hdgs	3 50		
21	" 1000 follow sheets	4 00		
24	" 1000 wine cards	2 50		
31	" 200 circulars, envs. & autograph	7 00		
			31 25	
1901.				
Jan. 8	" 100 invitations & envelopes	3 00		
	" 75 dinner slips	3 00		
9	" 50 special evening cards	4 50		
10	" 100 dinner slips, 2nd lot	3 00		
11	" 12 special menus, Mrs. May	2 00		
	" 100 cloak checks	1 00		
12	" 100 " "	1 00		
	" 50 all-day bills	10 00		
14	" 25 breakfast bills	6 25		
	" 25 all-day bills & changing	5 50		
	" 1000 envelopes	3 00		
	" 4 cards, officers' breakfast	1 25		
15	" 1500 letter-headings	7 00		
	" 1500 note "	6 00		
	" 25 all-day bills & changing	5 50		[$1 pd. Marshal.]*

[* Words and figures enclosed in brackets in pencil in copy.]

		To 4 cards, officers' breakfast	1 25	
	16	" 1000 bills	3 25	
	17	" 1000 invitations, 850 envelopes	10 25	
	18	" 100 special booklets, breakfast	28 50	
	19	" crest	7 50	
		" 25 wine lists	9 00	
		" 100 special menus, 19th & 20th	1 75	
		" 100 cards, automobile service	2 25	
		" 30 special Sunday lunch	1 25	
				127 00
[1.65 pd.]*				158 25
[1.60 "]*				
4		Amount forward	158 25	
Jan.	19	To 50 night luncheon	1 25	
	25	" 200 circulars, 250 envelopes	4 25	
	26	" 12 wine lists	1 25	
		" 40 menus, newspaper men	2 50	
		" 8 special menus, Sat., 26th	1 00	
	28	" 1000 small bills	2 50	
	30	" 25 all-day bills	2 50	
		" 1000 6¾ envelopes	3 00	
		" *Carte du Jour*, 14 days	13 80	
				190 30
Feb.	2	" 25 special evening cards	1 50	
		" 50 all-day bills	3 00	
		" 40 menus, Lehigh	1 50	
				6 00
				196 30

[*Words and figures enclosed in brackets in pencil in copy.]

Memorandum.

April 9, 1901.—Appeal and appeal bond filed in justice's court.

5 *Certificate of Proceedings.*

Filed April 18, 1901.

In Justice's Court of the District of Columbia—Before Anson S. Taylor, a Justice of the Peace.

WILLIAM F. ROBERTS, Plaintiff,
vs.
J. S. BARTON KEY and JAMES P. SCOTT, Copartners, Defendants.

No. 48692. Action for Debt for $196.30. 44625.

Date.	Proceedings.
Feb. 5, 1901	Summons issued to C. V. Mallet, constable; also to Aulick Palmer, U. S. marshal; returned Feb. 8/01, summoned as within directed, personally as to Jas. P. Scott. Aulick Palmer, U. S. marshal. Feb. 9/01, plaintiff appeared by counsel, def'd't Scott by counsel, and case continued until Feb. 14/01, 2.30 p. m. Feb. 13/01, summons returned, summoned as within directed as to J. S. Barton Key. C. V. Mallet, constable. Feb. 13/01, subpœna issued for J. S. Barton Key and Chas. Dailey, witnesses for plaintiff; returned Feb. 14/01, summoned as within directed. C. V. Mallet, constable 1.60/100 costs. Feb. 14/01, continued until Feb. 19/01, 3 p. m.; again until Feb. 26/01 3 p. m.; again until Mar. 6/01, 3 p. m.; again until Mar. 13/01, 3 p. m.; again until Mar. 20/01, 3 p. m.; again until Mar. 27/01, 3 p. m.; again until April 3/01, 3 p. m.
April 3, 1901	Judgment for plaintiff after trial for $196.30/100 debt, on interest from Feb. 5, '01, with $6 60/100 costs. Notice of appeal given April 11/01. Undertaking on appeal filed and approved, with the United States Fidelity and Guarantee Co. as surety, 75c. costs. April 11/01, certification appeal, 50c. costs. A. S. TAYLOR, *J. P.* [SEAL.]

6 DISTRICT OF COLUMBIA, *County of Washington,* } *ss:*

I, Anson S. Taylor, one of the justices of the peace in and for the said county and District, do hereby certify that the foregoing is a true statement from my docket of all the proceedings had before me in the above cause, and that the annexed are all the original papers therein.

Given under my hand and seal this 11 day of April, A. D. 1901.

A. S. TAYLOR, *J. P.* [SEAL.]

Cost, paid by plaintiff, $6.60.
Cost, paid by defendant, $1.25.

Supreme Court of the District of Columbia.

Memorandum.

January 23, 1902.—Verdict for plaintiff against J. S. Barton Key, defendant, for $196.30.

7 Supreme Court of the District of Columbia.

FRIDAY, *February* 28, 1902.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

* * * * * * *

By Justice Anderson.

WILLIAM F. ROBERTS, Plaintiff,
vs.
JAMES S. BARTON KEY and JAMES P. SCOTT, Defendants. } At Law. No. 44625.

Upon hearing the motion for a new trial filed herein by the plaintiff, it is considered that said motion be, and hereby is, overruled and judgment on verdict ordered; therefore it is considered that the plaintiff recover against James S. Barton Key and the United States Fidelity and Guaranty Company, his surety, one hundred and ninety-six dollars and thirty cents ($196.30), being the money payable by them to the plaintiff by reason of the premises, together with his costs of suit, to be taxed by the clerk, and have execution thereof; and, further, it is considered that James P. Scott go thereof without day and recover against the plaintiff his costs of defense, to be taxed by the clerk, and have execution thereof.

8 *Order for Appeal.*

Filed March 7, 1902.

In the Supreme Court of the District of Columbia, the 7th Day of March, 1902.

WILLIAM F. ROBERTS, Plaintiff,
vs.
JAMES S. BARTON KEY and JAMES P. SCOTT, Copartners. } At Law. No. 44625.

The clerk of said court will please note an appeal to the Court of Appeals from the judgment entered in the above cause on February 28th, 1902, and issue citation.

HENRY P. BLAIR,
Attorney for J. S. Barton Key.

9 In the Supreme Court of the District of Columbia.

WILLIAM F. ROBERTS
vs.
JAMES S. BARTON KEY and JAMES P. SCOTT. } At Law. No. 44625.

The President of the United States to William F. Roberts, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause

therein under and as directed by the rules of said court, pursuant to an appeal filed in the clerk's office of the supreme court of the District of Columbia on the 7th day of March, 1902, wherein James S. Barton Key is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 7th day of March, in the year of our Lord one thousand nine hundred and two (1902).

J. R. YOUNG, *Clerk*,
By W. E. WILLIAMS, *Ass't Clerk*.

Service of the above citation accepted this 14th day of March, 1902.

W. C. PRENTISS,
Attorney for Appellee.

10 *Memorandum.*

March 13, 1902.—$50 deposited in lieu of appeal bond.

Memorandum.

March 31, 1902.—Term prolonged 38 days to settle exceptions.

11 Supreme Court of the District of Columbia.

MONDAY, *April* 28, 1902.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

* * * * * * *

WILLIAM F. ROBERTS, Plaintiff,
vs.
J. S. BARTON KEY ET AL., Defendants. } At Law. No. 44625.

Now again comes here the defendant J. S. Barton Key, by his attorney, and tenders to the court here his bill of exceptions taken during the trial of this cause, and prays that the same may be duly signed, sealed, and made part of the record, now for then, which is accordingly done.

12 *Bill of Exceptions.*

Filed April 28, 1902.

In the Supreme Court of the District of Columbia.

WILLIAM F. ROBERTS, Plaintiff,
vs.
J. S. BARTON KEY and JAMES P. SCOTT, Co-partners, Defendants. } No. 44625. At Law.

Bill of exceptions.

Be it remembered that the above-entitled cause came on for trial before Mr. Justice Anderson and a jury on January 20th, 1902, Mr. William C. Prentiss appearing on behalf the plaintiff, Mr. Henry P. Blair appearing on behalf of the defendant J. S. Barton Key, and Mr. F. D. McKenney and Mr. J. S. Flannery on behalf of the defendant James P. Scott.

Thereupon the plaintiff demanded that a jury be drawn, and, the attorneys for the respective defendants assenting thereto,
13 a jury was drawn, and, counsel for all parties having waived any and all objection to the manner in which said panel was made up or drawn, said jury was sworn.

And thereupon counsel for the plaintiff, to maintain the issues on his part joined, introduced evidence as follows:

WILLIAM F. ROBERTS, the plaintiff, as a witness in his own behalf, stated that his occupation was that of engraving and printing stationery; that he was acquainted with the defendant Key, but not with the defendant Scott; that he had had business dealings with the defendant Key in the way of supplying printed bills of fare, note-heads, and stationery for the Hotel Barton; that he had his books of original entry containing the account for such supplies in court; that all orders covering the different items of work and stationery were placed with him by Mr. Key; that the transcript of the account annexed to the writ in this case was a correct transcript from his ledger; that the account as so made up was rendered to Mr. Key and admitted by him to be correct.

Thereupon, on cross-examination by the attorney for the defendant Scott, the witness stated that the pencil writing on said transcript of account annexed to the writ in this case was in the handwriting of his attorney, Mr. Prentiss; that witness had never had any conversation with Mr. Scott in regard to the business covered by the account sued on at any time; that all orders were given to him by Mr. Key or by Mr. Key's chef; that all charges on his books of original entry and on his ledger relating to this account were entered in the name of "J. S. Key," "J. Bar-
14 ton Key," and "Hotel Barton;" that none of them were entered in the name of Mr. Scott, nor does Mr. Scott's name

appear in connection with such items on those books; the sole debtor's name on the ledger in connection with said items is that of J. S. Barton Key; that the typewritten transcript of the account annexed to the writ in this case is a correct copy of the ledger account, in so far as it is typewritten; that the words "and James P. Scott, copartners," which are written on the account in lead pencil, were written thereon by Mr. Prentiss after the time the suit was brought or just about the time; that this account was made up about the time the hotel went into the hands of the receiver—that is, about February 4th or February 5th.

Witness also testified on cross-examination that the printing done by him included envelopes and letter-heads, wine cards, cloak checks, and the like; that on some of these papers no name appeared except the name of the hotel, and that on the letter-headings on which Mr. Key's name appeared his name was followed by the word "proprietor;" that no payments had been made on the present account; that prior to the opening of the present account Mr. Key had a small account for stationery for the Hotel Barton, and had settled the same; that said account was paid by check, and while witness did not remember fully about the check he had no doubt that the same was a check of Mr. Key.

Thereupon, at the demand of the attorney for the plaintiff and pursuant to notice duly served upon him in accordance with rules of court, the attorney for the defendant Scott produced and handed to attorney for plaintiff the following letter, which was thereupon read in evidence without objection:

"Room 719, Postal Telegraph building.

NEW YORK, *Nov.* 7, 1900.

Mr. James P. Scott, Waldorf-Astoria, New York.

DEAR SIR: I write this to confirm our conversation of a few days ago, until such papers can be executed that will be satisfactory to both parties.

It is understood by me that I hereby bind myself to the effect that in consideration of your going on my bond for the lease of the Wellington Hotel property and investing in repairing and opening said hotel a sum of money not to exceed $5,000, which $5,000 under the terms of my lease are to be deducted from the rent at the rate of $1,000 per year, I hereby agree that the finances of the said hotel shall be handled by a treasurer or cashier to be appointed or approved by you; that all payments shall be made only on joint check of said cashier and myself, and that you shall receive in consideration of the foregoing from me a sum equal to one-half of my profits.

Very truly yours, JAS. BARTON KEY."

CHARLES F. DALY, a witness on behalf of the plaintiff, testified as follows:

That during the months of November and December, 1900, and January and February, 1901, he was barkeeper at the Barton hotel;

that he went to work there about November 22nd and
16 stayed until the receiver took hold of the property, about February 5th, 1901; that Mr. Scott first came to the hotel the latter part of November or first of December; perhaps stayed there two or three days, and was backwards and forwards, off and on, until the receivers took charge; that "Mr. Scott came in and I was introduced to him by Mr. Key as a partner;" that Mr. Scott spoke to Mr. Key in regard to different things about the hotel; gave his opinion regarding the paper, and things of that sort. Mr. Scott spoke to witness about the pictures in the bar not hanging as they should. Mr. Key gave witness instructions to give Mr. Scott whatever he desired from the bar. Mr. Key would give Mr. Scott an introduction to a gentleman as his partner. I have heard him lots of times. Mr. Scott told witness that he was to bring Mrs. Page over to act as cashier to handle the money and sign all the checks. Mrs. Page acted as cashier at the hotel, and took the receipts from the bar every night after Mr. Key had left the hotel. She carried the money upstairs to Mr. Scott.

On cross-examination the witness testified that he had accompanied Mrs. Page to Mr. Scott's room on one occasion when she had the bar money in the tin box.

On redirect examination the witness stated that after Mr. Key had left the hotel and gone to Baltimore Mr. Scott told him to continue at the hotel and he would see that everything went all right; that Mrs. Page would accept the money at night. He thought Mrs. Page came to the hotel about January, 1901.

(Mr. PRENTISS:)

Q. Did you ever have any conversation with Mr. Scott respecting his interest in the hotel, if any?

A. Only to look after it and do what I could for them in regard to business matters.

Q. Did he ever say to you what interest he had in the hotel, or what relation he bore to it?

A. No. He didn't make any statement of that sort.

Q. Did he ever tell you who the proprietor of the hotel was?

A. No, sir; he didn't.

Mr. Key left the hotel for Baltimore on the 2nd of February, 1901, which was a Saturday, and the receivers took charge of the hotel on the following Tuesday. Mr. Key came down to the bar and said
17 he was going. He shook hands with me and said good bye, and that's all I saw of him.

On recross-examination the witness testified that he was employed in the hotel as a barkeeper by Mr. J. Barton Key on the 22nd day of November, 1900; that Mr. Key gave him all instructions with regard to the management of the bar and paid him a salary; that he had no conversation whatever with Mr. Scott until some time in December; on this occasion Mr. Scott was sitting in the bar and complimented him upon the nice appearance of the lunch counter, and made certain suggestions with respect to making

the bar look attractive. Other persons who dropped into the bar also complimented him and made suggestions to him, but he did not regard their compliments and suggestions as much as he did those coming from Mr. Scott, as he attached more weight to what Mr. Scott would say than to what Smith or Jones might say. Witness never received any money from Mr. Scott, and, apart from ordering him to straighten up some pictures hanging in the bar, never took any orders from him. Witness was introduced to Mrs. Page by the head bellman. Mr. Scott did not bring Mrs. Page in in order to introduce her to witness, though he remarked on one occasion when Mrs. Page was present, "This is my bar and this is my bar-keeper." Witness understood that Mrs. Page was Mr. Scott's cousin. Mr. Scott remarked to him, "I am going to bring a cousin of mine over here; she is poor and she wants the position, and she is a nice woman, and I am going to put her in charge of my money and to sign all checks." Witness did not know what money Mr. Scott had or what checks he would have to sign about the hotel. Witness only knew that Mrs. Page was the person Mr. Scott referred to as his cousin, because James Robinson, Mr. Scott's colored valet, said so.

Thereupon attorney for the plaintiff introduced in evidence the bill of complaint filed in the supreme court of the District of Columbia, in equity cause No. 22044, wherein James P. Scott was complainant and James Barton Key was defendant, on the ground
18 that said bill of complaint contained an admission by Mr. Scott as to his relations with Mr. Key, said bill of complaint reading as follows:

"To the honorable the associate justice of the supreme court of the District of Columbia, holding an equity term:

Your complainant, James P. Scott, who sues in this action in his own right and in behalf of any and all other creditors of the above-named defendant, James Barton Key, who may seek relief by and contribute to the costs and expenses of these proceedings, respectfully shows:

1. Your complainant is a citizen of the United States and of the State of Pennsylvania, recently residing in Paris and at present temporarily sojourning in the city of Washington, in the District of Columbia.

The defendant, James Barton Key, is a citizen of the United States, having his domicile in the city of Baltimore, in the State of Maryland.

2. That some time in November, A. D. 1900, the defendant represented to your complainant that he was about to embark in the enterprise of keeping a hotel in the city of Washington, District of Columbia, and applied to this complainant for assistance in such regard, representing to your complainant that with such assistance as your complainant was able to and would extend to him the defendant would be able to secure a lease of the premises situated at 723 15th street northwest, in the city of Washington, formerly known as Welcker's hotel and later as the Hotel Wellington.

3. Your complainant, being impressed with the repre-
19 sentations made to him by said defendant, agreed, as requested, to become surety for the prompt payment of the rent of said premises under the contemplated lease, and also to advance from time to time, as occasion might require, sums of money, not to exceed $5,000 in the aggregate, for the purpose of necessary repairs and improvements to be made in and about said premises, it being understood by and between your complainant and said defendant that the said sums of money so advanced should be repaid out of a rebate which was to be allowed by the lessor to the lessee, and that in consideration of your complainant becoming surety for the prompt payment of the rent as aforesaid and the advancements of said sums of cash, this complainant should be entitled, by his agent acting as treasurer or cashier, to handle all the receipts of said business, and to receive for his own use and benefit from the defendant one-half of the profits to be derived from the conduct of said business, it being further understood that, except as above set forth, your complainant was not to be identified with or concerned in the conduct of said enterprise.

4. On or about the 5th day of November, 1900, said defendant did enter into a lease of the premises in question with one Cecilia d'Andigna, acting through and by Henry May, her attorney-in-fact, which said lease granted to the defendant the use and occupation of the premises in question for a period of five years, to begin on the 1st day of December, 1900, the rent reserved being the sum of $7,500 per annum, payable monthly in advance at the rate of $625 per month, with a rebate to the lessee on account of improvements made and to
20 be made in and about said premises of the sum of $5,000, to be deducted from the said rent reserved at the rate of $1,000 per annum; that, in accordance with the agreement above set forth, this complainant did become surety upon said lease for the prompt payment of the rent reserved and did further advance the said sum of $5,000 in cash to pay for the necessary improvements and repairs to said premises; that, notwithstanding your complainant had thus fully complied with his obligations under said agreement, he has, at the instance and request and as the result of the importunities of the defendant, advanced to said defendant, to be by him applied in the stocking and equipping of the premises in question and the preparation of the same for the reception of guests and for and on account of the conducting of the same as a hotel, further sums of money, aggregating, in addition to the sum of $5,000 above set forth, the further sum of about $3,000, making a total of cash advanced of about $8,000, and has also from time to time, at the instance and request of said defendant, endorsed said defendant's promissory notes in various sums, the total amount of said notes which have been discounted or otherwise disposed of by said defendant aggregating, as this complainant believes, approximately $2,000.

5. For the purpose of carrying on the business of a hotel in the premises aforesaid, extensive improvements and repairs both of the hotel property itself and of the contents thereof were made by the

said defendant, who used for such purposes in a large measure the cash furnished by your complainant above referred to. Your complainant is informed and believes, and therefore avers,
21 that, notwithstanding the large payment of cash on such accounts, that there *is* still due and owing from said defendant to builders and materialmen, to upholsterers and decorators, and to dealers in supplies of various sorts and kinds considerable sums of money, aggregating, as your complainant believes, the further sum of $10,000, and that many of said creditors insist upon immediate payment of the amount due to them.

6. Your complainant avers that some time during the month of December, 1900, the said premises, being in fit condition, were opened by said defendant as a hotel, under the name of "Barton's," and that since such opening it has, until the present time, been conducted by said defendant as a hotel, but notwithstanding the distinct agreement between defendant and your complainant that the latter, by his agent acting as treasurer or trustee, should handle the receipts of said business, the said defendant has not permitted the same to be done, nor has he at any time rendered to your complainant any account of the sums received in the course of such business, nor of the disposition made thereof, but, on the contrary, although often requested so to do, has refrained from making such accounting, and has kept this complainant in the dark as to the financial condition of said business.

8. Your complainant avers that said defendant has failed and neglected to pay out of said receipts the rent for said premises for the months of January and February, 1901, as will more fully appear from a letter this day received from J. V. N. Huyck, a real-estate broker having charge of the collection of said rents for the lessor, which said letter and its enclosure is hereto annexed,
22 made a part hereof, and marked "Exhibits A and B" respectively.

Complainant further avers that defendant has neglected for several weeks past to pay to the employés of said hotel their respective wages and has likewise neglected to pay to the market men and to supply men of various sorts the amounts which have become due and owing to them.

8. The complainant avers that the defendant is lacking in natural ability and unfit by training for the management of said business; that he is without means to defray the many obligations which he has incurred, is in a bad state of health, and has left this jurisdiction; that the hotel is without proper supplies requisite and necessary to enable the business to be further conducted; that the servants and employés are clamoring for their wages and the dealers in market and other supplies demand immediate payment; that the entrances and corridors of the building are obstructed by creditors clamoring for payment, and they are threatening immediate legal proceedings.

9. The complainant is informed and believes, and therefore causes the court to be informed, that the business of a hotel, if prop-

erly conducted in and upon the premises aforesaid, would by reason of the favorable location of said premises be lucrative and productive of much profit; that if attachments and other processes at law can be levied upon the said premises and contents thereof at the instance of warring creditors in a race of diligence the said property and all the value that may be therein will be dissipated and wasted to the great detriment not only of your complainant but of all other creditors who may have claims against the same.

23 Wherefore, for the purpose of preserving the said property and business, and for the purpose of having the said business temporarily, at least, conducted in a proper and businesslike manner, and for the preservation of the assets of said defendant for the benefit of all creditors who may seek to avail themselves of the relief afforded by this bill, your complainant prays that a receiver may be appointed, who shall forthwith take possession of said premises and of the leasehold interest of the defendant therein and of all of the contents of said premises, by whatever name and description the same may be designated, and to hold the same until the further order of this court, and to continue the said business upon such terms and upon such directions as this honorable court may from time to time devise and give, and ultimately to wind up the said business and to make such sale or other disposition of the said leasehold interest in said premises and of the business conducted therein and of the assets and properties belonging to said defendant and found upon said premises as this honorable court shall direct.

To the end, therefore, that said defendant may be restrained and enjoined from disposing of the said leasehold interest in said premises, or of any interest therein, and may be further restrained and enjoined from disposing of any of the assets of said business or contents of the premises aforesaid, and that said defendant may render an accounting to your complainant, and for such — and other relief as to this honorable court may seem proper, your complainant prays

24 that a gracious writ of subpœna may be issued out of this honorable court, addressed to this defendant, James Barton Key, requiring and commanding him to appear herein at a day to be fixed by this court to show cause why he should not be perpetually enjoined and restrained and why a receiver should not be appointed as prayed.

And complainant will ever pray, &c., &c., &c.

JAMES P. SCOTT,
Solicitor for Complainant.

F. D. McKENNEY,
J. S. FLANNERY,
Solicitors for Complainant.

DISTRICT OF COLUMBIA, *ss:*

I, James P. Scott, being first duly sworn, do depose and say that I have read over the foregoing and annexed bill of complaint and know the contents thereof, and that the statements therein contained

made of my own knowledge are true, and those made upon information and belief I believe to be true.

JAMES P. SCOTT.

Subscribed and sworn to before me this 4th day of February, A. D. 1901.

AYLETT T. HOLTZMAN,
[SEAL.] *Notary Public, D. C.*"

F. W. DAW, a witness on behalf of the plaintiff, testified that he has been for three or four years last past a paper-hanger and decorator; that up to the 28th day of February, 1901, he was a member of the firm of Daw & Dickson. At present he is engaged in business on his own behalf; that he did work in the Hotel Barton in the latter part of November, 1900; that his contract for such work was made with Mr. Key; that he never saw Mr. Scott except
25 on one occasion when he was showing Mr. Key some samples of wall-paper, and a gentleman came into the room; Mr. Key introduced this gentleman to him in the following words: "Mr. Daw, this is Mr. Scott, my backer; Mr. Scott, this is Mr. Daw, our paper-hanger." Witness went on showing the samples of paper, and the gentleman who had been introduced as Mr. Scott presently said, "Jim, I don't like that paper. I would sooner have that paper," mentioning some other paper witness was showing him at the time; witness does not recollect whether Mr. Scott took any further part in the selection of the papers or not.

JAMES BARTON KEY, being called as a witness on behalf of the plaintiff, testified that he is one of the defendants in this case; that the letter heretofore introduced in evidence from himself to Mr. Scott was taken by him to Mr. Scott's room by witness and left on Mr. Scott's bureau; witness told Mr. Scott that it was a letter regarding the proposition he had made to Scott for the loan of money; Mr. Scott never had any further conversation with witness about the letter, but he went on his bond to secure the rent of the hotel and advanced the money; at the time of opening the hotel witness was without means, and the hotel was opened entirely on the money loaned to witness by Scott; that about February of the following year Mr. Scott and witness had a falling out. Scott demanded of witness to know what he (witness) was going to do in order to secure Scott the money that he had loaned to witness; at the same time Scott said he wanted to know whether, provided he got some
26 experienced hotel man who could do better with it, witness was willing to let him take witness' place, and said he had one who was willing to come in; he also said that he thought it would be a good idea to have some man more experienced in the hotel business than was witness in charge of the hotel as manager; witness declined to assent to such suggestion.

(Mr. PRENTISS:)

Q. As a matter of fact, did he not demand that you should sign over the lease and get out?

A. He did not.

Q. Just state what his demand was.

A. As nearly as I can recollect, he thought it would be a good idea to have some man more experienced in the hotel business in there. He was still willing that I should be there and retain some interest, which we could agree upon in some way or other. If this other man was willing to come in and take my place, he was willing to accept it, provided I would give him the direction of matters; and I declined to agree to it.

* * * * * * *

(Mr. PRENTISS:)

Q. Do you recollect talking with Mr. Clarke, about that time, after you had some words with Mr. Scott?

A. I saw Mr. Clarke a great many times.

Q. You and your counsel were both given notice to produce a letter from Mr. Scott, referred to in a conversation that you had with him. Have you that letter?

A. No, sir, I have no such letter.

Q. You say you have not such a letter now?

A. No; there was no such letter in existence. It was a letter—I spoke to Mr. Clarke about a little scrap of paper written about some friends of his who got some rooms that were freshly painted. He heard of it and wrote me a little note about it—somebody that he had recommended to come down there—some Philadelphia people.

Q. That was the note you referred to in your conversation with Mr. Clarke?

A. Yes.

Q. Have you that little slip?

A. No, I have not; I didn't keep it.

Q. That, I believe, was signed "Your partner, James P. Scott"?

A. No, it was not signed that way. There was some allusion to partner, but it was not signed "Your partner, James P. Scott." I forget just how it was signed, but it was something about "partner." It used the word partner, but it was not signed that way. It was written in a paragraph right through. It was not signed as partner. He said that we had been talking about having a very precise and nice hotel, and all that, and he wrote to say that he thought this was not quite the idea of running a hotel on the style of the Bellevue, to have people who came there put into rooms that were freshly painted. I forget just how it was worded.

The witness having produced the guests' register of the Hotel Barton, pursuant to notice served upon him by the attorney for the plaintiff, stated that Mr. Scott's name did not appear anywhere upon said register, nor upon the transient guests' ledger.

27

Thereupon, upon cross-examination, the witness testified that Mr. Scott came to the Hotel Barton at his request and as his guest a few days before the hotel was opened for the reception of guests. At the time of the opening of the hotel Mr. Scott was sick and confined

to his room, and witness reserved the first line on the guests' register for the registration of Mr. Scott's name, saying to the first man who registered to "leave a place for my first guest, Mr. Scott, at the top of the page." Witness invited Mr. Scott to stop at the Hotel Barton during the opening, so far as his rooms were concerned, as witness' guest. Mr. Scott paid cash for everything he got in the restaurant and at the bar until witness told him not to pay cash, but to sign regular charge checks, which could be kept together and the amount thereof could be charged againt the money which witness owed to him. This was done for a long time. These checks so signed by Mr. Scott were kept by witness until he left the hotel, just before the receivers took charge. Witness does not know what has become of them since. The letter introduced in evidence expresses the relationship between Mr. Scott and himself with respect to the business of the hotel, and their relations in that regard were not otherwise than as expressed in said letter. With respect to the clause in the letter to the effect that "the finances of the hotel shall be handled by a treasurer and cashier to be appointed and approved by you," witness testified that a lady, Mrs. Page, was brought on from New York, but she never went
28 actually to work, because the books were being prepared for her by an expert book-keeper; that she never took hold of any of the business of the hotel. Until witness went away she had never handled any money of the hotel. Witness left the hotel the first Saturday in February, and went to Baltimore to spend Sunday. He was taken sick while there, and on the next day was compelled to go to a hospital for medical aid, and did not return to Washington until the following Monday week. With respect to the clause of the letter to the effect that "all payments shall be made only on the joint checks of said cashier and myself" (meaning witness), witness states that no payments were made on such joint checks; that he, witness, signed all checks individually; that there were no profits received by him at any time from the business.

Attorney for plaintiff thereupon read in evidence a letter from James P. Scott to W. B. Moses and Sons in the following words and figures:

"J. Barton Key, prop.—Barton's, formerly Welcker's, on the European plan.

Tel. 2557.

WASHINGTON, D. C., *December 22nd*, 1900.

W. B. Moses, 11th & F Sts. N. W., city.

GENTLEMEN: Mr. James Barton Key, with whom I am financially interested in the rebuilding and refitting of Barton's new hotel, formerly the Wellington, informs me that he is about to pur-
29 chase from you a bill of goods consisting of carpets, rugs and various other house-furnishing materials, which bill will amount to something between eight hundred and fifteen hundred dollars, and Mr. Key tells me that he has arranged with you to pay

you one-quarter of the amount of the bill in cash, on which account he has already paid you $250.00, and for the balance he is to give you three equal payments in notes endorsed by me at 30 days, 60 days and 90 days, dating January 15th.

I write this to say to you that when the goods are delivered and the notes are prepared by your firm and Mr. Key, I will, as requested by Mr. Key, endorse the same.

Very truly yours, JAMES P. SCOTT."

Thereupon JAMES BARTON KEY, being recalled for further cross-examination, produced a ledger belonging to the Hotel Barton, and stated that the same was the first ledger used in that hotel; that said ledger contained an account with James P. Scott, in which he was charged with cash items beginning on the 12th day of December, 1900, and from time to time until January 28th; that the charges made against Mr. Scott, and appearing upon said ledger, amounted to $281.91.

Thereupon, the attorney for the plaintiff having announced the testimony on behalf of the plaintiff closed, the attorney for the defendant Scott moved the court to direct the jury to return a verdict in favor of the defandant Scott; which motion was granted by the court and an announcement made by the court in the following words: "I shall direct the jury, when I come to charge them in this case, to return a verdict for Scott."

30 Thereupon the attorney for the defendant Key moved the court to direct the jury to return a verdict in favor of the defendant Key also, on the ground that the suit of the plaintiff was against the defendants Key and Scott as coparters, and it appearing from the proof as declared by the court that no copartnership existed between the defendants, therefore no judgment could be rendered against the defendant Key in the pending proceedings; which motion the court overruled, and to which action of the court the attorney for the defendant Key then and there duly excepted, and such exception was noted upon the minutes of the trial justice.

Thereupon the court instructed the jury as follows:

"GENTLEMEN OF THE JURY: In view of the conclusion reached by the court as to the legal effect of the testimony which has been submitted to you, the court instructs you in this case to return a verdict for the defendant Scott and against the defendant Key. The undisputed facts make it proper that that character of verdict should be rendered. Your verdict should be in favor of the plaintiff Roberts against the defendant Key for $196.30."

Mr. BLAIR: "I reserve an exception to the instructions of the court. It seems to me that in this particular case we are entitled to a special finding by the jury that there is no partnership in this case."

The COURT: "It seems to me that you find your ground of

31 exception in my instruction to the jury. I have in effect told the jury that the court finds as matter of law that from

the undisputed facts in the case there is no partnership; and therefore I have instructed the jury to return a verdict in favor of the defendant Scott on that ground. I do not see why there should be a special verdict."

Mr. BLAIR: "We think that is sufficient, and if put in that form we have no objection to it."

Mr. McKENNEY: "I think the instruction should be that, it appearing from the undisputed evidence in this case that there was no partnership relation between the defendants to this action, the verdict of the jury upon the pleadings and proof should be for the defendants."

The court having further instructed the jury to return a verdict for the defendant James P. Scott, and also to return its verdict in favor of the plaintiff against the defendant James Barton Key in the sum of $196.30, the attorney for the defendant James Barton Key noted an exception to the ruling of the court, in so far as it directed the jury to return a verdict in favor of the plaintiff and against said defendant Key for the sum mentioned, both of which exceptions were duly entered upon the minutes of the trial justice before the jury returned its verdict in accordance with the court's instruction.

Be it further remembered that the foregoing was all of the evidence tendered in the above cause in the course of the trial,
32 and that the separate and several exceptions taken by counsel, as hereinbefore set forth, were taken before the rendition of the verdict herein.

Wherefore the attorney for the defendant James Barton Key then and there prayed the court and now prays the court to sign and seal this his bill of exceptions, and the attorney for the plaintiff Roberts objects to the signing and sealing of the same upon the ground that there is no right of appeal allowed by law from the judgment of this court in this cause; which objection being overruled by the court and an exception to such action being first duly noted, this bill of exceptions is accordingly signed and sealed this 28th day of April, A. D. 1902.

T. H. ANDERSON, [SEAL.]
Associate Justice.

Settled by counsel this 28th day of April, 1902—
HENRY P. BLAIR,
Attorney for Defendant Key,
F. D. McKENNEY,
Attorney for Defendant Scott,
W. C. PRENTISS,
Attorney for Plaintiff,

without prejudice to objection noted above.

33 *Motion to Extend Time for Filing Record.*

Filed April 29, 1902.

In the Supreme Court of the District of Columbia, the 29th Day of April, A. D. 1902.

WILLIAM F. ROBERTS, Plaintiff,
vs.
J. S. BARTON KEY and JAMES P. SCOTT, Co-partners, Defendants. } At Law. No. 44625.

Now comes the defendant J. S. Barton Key, above named, and moves this honorable court to extend the time for filing the record on appeal in the Court of Appeals of the District of Columbia for thirty (30) days from this date, and as ground for such motion respectfully shows that it has been impossible to prepare the record in this cause up to this time, pending the settlement of the bill of exceptions herein.

H. P. BLAIR,
Attorney for Defendant J. S. Barton Key.

Order Extending Time to File Record.

Filed April 29, 1902.

In the Supreme Court of the District of Columbia, the 29th Day of April, A. D. 1902.

WILLIAM F. ROBERTS, Plaintiff,
vs.
J. S. BARTON KEY and JAMES P. SCOTT, Co-partners, Defendants. } At Law. No. 44625.

34 Upon consideration of the motion of the defendant J. S. Barton Key, heretofore filed herein, it is, this 29th day of April, A. D. 1902, ordered that the time for filing the transcript of record on appeal in the above-entitled cause be, and the same is hereby, extended for thirty (30) days from this date.

T. H. ANDERSON,
Associate Justice, D. C.

Directions to Clerk for Preparation of Record.

Filed May 5, 1902.

In the Supreme Court of the District of Columbia, the 5th Day of May, 1902.

ROBERTS vs. KEY. } At Law. No. 44625.

The clerk of said court will copy in the transcript of record for the Court of Appeals the following:

Original writs issued by the justice of the peace;

Itemized bill of W. F. Roberts, showing pencil-marks therein;

Certificate of proceedings before justice of the peace, and make a memorandum showing the appeal to the S. C. D. C., trial, verdict, judgment in S. C. D. C., and appeal to Ct. of Appeals & bond.

HENRY P. BLAIR,
Att'y for J. S. Barton Key, Appellant.

35 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } ss:

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 34, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 44625, at law, wherein William F. Roberts is plaintiff and James S. Barton Key *et al.* are defendants, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 12th day of May, A. D. 1902.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1220. James S. Barton Key, appellant, *vs.* William F. Roberts. Court of Appeals, District of Columbia. Filed May 14, 1902. Robert Willett, clerk.

36 In the Court of Appeals.

JAMES S. BARTON KEY, Appellant,
vs.
WILLIAM F. ROBERTS. } No. 1220, April Term, 1902.

Now comes the appellee by his attorney and showing to the court that the appellant's appeal herein is from a joint judgment against him and the United States Fidelity and Guaranty Company rendered by the supreme court of the District of Columbia in a cause pending therein on appeal from a judgment of a justice of the peace, moves the court to dismiss the said appeal to this court, for the reasons:

First. That the appeal is defective in not joining the said United States Fidelity and Guaranty Company as appellant and no proceeding by way of summons and severance having been had.

Second. That this court has no jurisdiction on appeal from a judgment of the court below in such cases.

W. C. PRENTISS,
Attorney for Appellee.

(Endorsed:) No. 1220. Court of Appeals, D. C., April term, 1902. James S. Barton Key, appellant, *vs.* Wm. F. Roberts. Motion of appellee to dismiss appeal. Court of Appeals, District of Columbia. Filed Jun- 3, 1902. Robert Willett, clerk.

37 THURSDAY, *June 5th, A. D.* 1902.

JAMES S. BARTON KEY, Appellant,
vs.
WILLIAM F. ROBERTS. } No. 1220.

The motion to dismiss the appeal in the above-entitled cause was submitted to the consideration of the court by Mr. W. C. Prentiss in support of motion, and leave is hereby granted him to file brief in cause No. 1199 on motion to dismiss.

38 JAMES S. BARTON KEY, Appellant,
vs.
WILLIAM F. ROBERTS. } No. 1220.

(Mr. Chief Justice ALVEY delivered the opinion of the court:)

The motion to dismiss the appeal in this case must prevail. The action was originally brought before a justice of the peace of this District to recover the sum of $196.30. The case was regularly tried by the justice of the peace, and a judgment was rendered for the plaintiff, and the defendants appealed to the supreme court of the District, where the appeal was tried *de novo* before a jury. The trial resulted in a verdict and judgment in favor of the plaintiff against one of the defendants, but in favor of Scott, the other defendant; and the defendant Key has appealed to this court.

This motion to dismiss is controlled and must abide the decision just made by this court in the case of *Groff vs. Miller*, in which it is held that section 82 of the new Code is in full force and operation, and not nullified by section 226 of the Code. The appeal must therefore be dismissed, *and it is so ordered.*

Appeal dismissed.

39 TUESDAY, *June 24th, A. D.* 1902.

JAMES S. BARTON KEY, Appellant,
vs.
WILLIAM F. ROBERTS. } No. 1220, April Term, 1902.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the supreme court of the District of Columbia, and on a motion to dismiss which was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that this cause be, and the same is hereby, dismissed with costs, for the want of jurisdiction.

Per MR. CHIEF JUSTICE ALVEY.

June 24, 1902.

40 Court of Appeals, District of Columbia, April Term, A. D. 1902.

JAMES S. BARTON KEY, Appellant,
vs.
WILLIAM F. ROBERTS, Appellee. } No. 1220.

Appeal from the supreme court of the District of Columbia.

Motion to Set Aside Judgment and Grant a Rehearing Herein.

Now comes J. S. Barton Key, by his attorneys, and respectfully moves this honorable court to set aside the judgment heretofore rendered herein on motion to dismiss this cause and to grant a reconsideration thereof, and as ground of such motion respectfully shows that this honorable court dismissed the appeal in this cause for want of jurisdiction, on the authority of its decision in the case of Groff *vs.* Miller, No. 1199, said decision turning upon the construction placed by this honorable court upon the conflicting provis-
41 ions of sections 82 and 226 of the Code of Laws for the District of Columbia, the court holding that the reasonable interpretation of such conflicting provisions necessitated the conclusion that this court had jurisdiction to hear and determine cases originating before justices of the peace only where said causes had been moved into the supreme court of the District of Columbia from the justice of the peace by certiorari and not by appeal.

By an act "To amend an act entitled 'An act to establish a Code of Law for the District of Columbia,'" which became a law on the

1st day of July, 1902, the Congress expressly provided that the Code of Law for the District of Columbia should be amended in the following particulars:

1. By striking out the whole of section 82;

2. By striking out the quotation marks in the third and fourth lines of section 226;

The effect of such amendments being to strike out the provision heretofore occurring in the Code to the effect that:

"In no case appealed from a justice of the peace shall there be a further appeal from the judgment of the supreme court,"

and leaving the positive law upon this subject as follows:

"Any party aggrieved by any final order, judgment or decree of the supreme court of the District of Columbia or of any justice thereof, including any final order or judgment in any case heard on appeal from a justice of the peace, may appeal therefrom to the said Court of Appeals and upon such appeal the Court of Appeals shall review such order, judgment or decree, and affirm, reverse or modify the same, as shall be just, except as provided in the following sections * * *."

Such amendments by the Congress in the manner and form in which they were made must be regarded as a legislative in-
42 terpretation by the Congress itself of its purposes and intentions respecting the conflicting provisions covering appeals from justices of the peace, as the same heretofore appeared in the Code, and must reasonably be taken as an express declaration by Congress that it was its intention, as expressed in former section 226 of the Code, to permit an appeal to the Court of Appeals from the judgment of the supreme court of the District in any and all cases appealed to said supreme court from a justice of the peace, thereby including in the privilege of appeal, as seems only natural and proper, cases technically appealed from justices of the peace as well as those removed into the supreme court by certiorari.

In view of this express declaration, it is respectfully submitted that the right intended to be conferred by Congress, as declared in the amendments, should not be denied to the appellant in this case, but that he should be permitted to have the benefit of the judgment of this court upon a question of general moment and of considerable gravity to himself.

Had this case been permitted to come before this honorable court in its regular order, there is no doubt that the appellant would have been accorded the full benefit to be derived from the amendments to the Code above referred to; and as the case is still within the control of the court, it is respectfully submitted that the summary proceedings on motion to dismiss should not be permitted to deny a right so expressly conferred.

HENRY P. BLAIR,
FREDERIC D. McKENNEY,
J. S. FLANNERY,
Attorneys for Appellant.

43 JAMES S. BARTON KEY *vs.* WILLIAM F. ROBERTS. } No. 1220.

Motion for rehearing of motion to dismiss appeal.

Mr. Chief Justice ALVEY delivered the opinion of the court:

For the same reasons that the motion for rehearing was overruled in the case of *Groff vs. Miller*, the motion in this case is overruled—the ground of the motions in both cases being the same.

Motion for rehearing overruled.

44 WEDNESDAY, *October 15th, A. D.* 1902.

JAMES S. BARTON KEY, Appellant, *vs.* WILLIAM F. ROBERTS. } No. 1220, October Term, 1902.

On consideration of the appellant's motion for a rehearing in the above-entitled cause, it is by the court now here ordered that said motion be, and the same is hereby, overruled with costs.

Per MR. CHIEF JUSTICE ALVEY.

October 15, 1902.

45 Court of Appeals, D. C.

J. S. BARTON KEY, Appellant, *vs.* W. F. ROBERTS. } No. 1220, Oct. Term, 1902.

OCTOBER 23, 1902.

SIR: In making up the transcript of the record in the above case for use in the Supreme Court of the United States please include therein a transcript of all proceedings had in the Court of Appeals, together with copies of the opinion of the court delivered by Mr. Chief Justice Alvey in the case of Groff *vs.* Miller, No. 1199, on June 23, 1902, and October 15, 1902.

HENRY P. BLAIR,
F. D. McKENNEY,
Attorneys for J. S. Barton Key.

To Robert Willett, Esqr., clerk Court of Appeals, D. C.

(Endorsed:) No. 1220. James S. Barton Key, appellant *vs.* William F. Roberts. Directions to clerk for preparation of transcript. Court of Appeals, District of Columbia. Filed Oct. 23, 1902. Robert Willett, clerk.

46 DILLER B. GROFF, Appellant, } No. 1199.
v.
FRANCIS MILLER.

(Filed June 23, 1902.)

(Mr. Chief Justice ALVEY delivered the opinion of the court:)

In this case there is a motion entered to dismiss the appeal, upon the ground that there is no jurisdiction in this court to hear and decide the case.

The case was instituted before a justice of the peace by whom it was tried and determined, and a judgment was rendered for the plaintiff. From that judgment an appeal was taken by the defendant to the supreme court of this District, where, after trial *de novo* before a jury, a judgment was rendered in favor of the plaintiff for $96.55, and from which judgment the defendant has taken an appeal to this court. The plaintiff in the judgment contends that the appeal to and determination by the supreme court of the District is final, and that there can be no further appeal to this court. If that contention be well founded, of course, this appeal must be dismissed.

The determination of this motion to dismiss involves a question of the proper construction of several of the sections of the new Code enacted by Congress for this District; the sections involved being those relating to civil actions instituted before justices of the peace, and appeals therefrom. The act of Congress of March 3, 1901, ch. 854 (31 St. p. 1189) is entitled "An act to establish a code of law for the District of Columbia," and whereby it is declared "That the following is hereby enacted and declared to be a code of law for the District of Columbia, to go into effect and operation from and after the first day of January, in the year 1902." The code thus enacted is divided into chapters, with many subdivisions and titles,
47 to embrace the contents of the entire enactment.

In chapter 1 of this Code, under title, *justices of the peace*, there are several sections that have more or less bearing upon the question presented. They are as follows:

"SECTION 7. Jury trials.—Trial by jury before justices of the peace is hereby abolished."

Section 8 provides, "That in all cases of *concurrent jurisdiction* the *defendant* may remove the case for trial into the supreme court of the District by a writ of *certiorari* (to be awarded by said court, or one of the justices thereof, upon a petition under oath, the form and substance whereof shall be prescribed by said court)."

"SECTION 9. Jurisdiction.—The said justices of the peace shall have jurisdiction in all civil cases in which the amount claimed to be due for debt or damages arising out of contracts, expressed or implied, or damages for wrongs or injuries to persons or property, does not exceed three hundred dollars, * * * and said jurisdiction shall be exclusive when the amount claimed for debt or damages, or the value of personal property claimed does not exceed fifty dollars, and *concurrent* with the said supreme court when it exceeds fifty dollars.'

"SECTION 30. Appeal.—Where the debt or demand, or the value o

personal property claimed, exceeds five dollars, and in actions for the recovery of possession of real estate, as aforesaid, either party who may think himself aggrieved by the judgment or other final order of a justice of the peace, may appeal to the supreme court of the District."

Under title, Supreme Court of the District of Columbia, it is provided by—

"SECTION 80. That on such appeal, the circuit court shall, in a summary way, hear the case *de novo* upon the proofs and allegations of the parties and determine the same according to the law and the equity and the right of the matter; but either party may demand a trial by jury."

48 "SECTION 82. In *no case appealed* from a justice of the peace shall there be *any further appeal* from the judgment of the circuit court." This is clear and positive.

But under title, Court of Appeals, occurs this provision:

"SECTION 226. Jurisdiction.—Any party aggrieved by any final order, judgment, or decree of the supreme court of the District of Columbia, or of any justice thereof, 'including any final order or judgment in any case heard on appeal from a justice of the peace,' may appeal therefrom to the said Court of Appeals;" and upon such appeal, &c.

These are all the provisions that would appear to have any relation to the question under consideration; and from them it would appear that there is difficulty in reconciling and making consistent section 82 with the provision contained in section 226, if we adhere strictly to the literal terms employed in the latter section. Indeed, it is clear, both provisions, according to the strict letter of the statute, will not stand together; one must yield and become a nullity in order to give the other effect, if we adopt the literal meaning of the terms employed in section 226. Congress certainly did not intend to produce any such result in the enactment of these provisions, but, on the contrary, intended each provision to have effect. We think, however, the apparent conflict and difficulty, growing out of the language employed in section 226, may be removed, and the sections reconciled and made consistent, by the application of a few well-established rules of construction of statutes.

In the first place, these provisions of the Code must be construed in the light of the pre-existing law, the reason of the matter, and also in view of the consequences that would be produced by adopting the contention of the appellant; that is to say, that the provision of section 226, being the later provision of the Code, should prevail, to the exclusion of the positive provision contained in section 82. This theory of the last expression of the legislature is the only argument that has been or can be invoked in support of the contention of the appellant. By that argument, the provision

49 so clearly and positively expressed by section 82 is utterly nullified, as if it were no part of the Code. Was this the intention of Congress, and should such be the construction? Why thus nullify and strike out section 82, in order to give force and literal effect to the provision contained in section 226? While

there may be some cases found that give countenance to such contention, yet the decided weight of decision is, that such construction should never be adopted except upon the most urgent and irresistible reason. It would seem to be well settled that a code, or body of revised laws, should be regarded as a system of contemporaneous acts, as established *uno flatu;* or as a simultaneous expression of the lawmaker. Its various sections relating to the same subject should, if practicable, be construed together, as one; as one act or chapter, or as continuous sections of the same act; and one chapter is to be read with another, relating to the same subject, as one body of law, though collected from independent laws of previous enactment, originally passed at different times and re-enacted by a revisory act. If possible, the various portions of such code or revision must be so construed as to harmonize with one another. Its general system of legislation upon the subject-matter should be taken into view, and any particular article construed in conformity therewith, unless an intention to depart from it be clearly shown; and definitions contained in it are to be construed with reference to its positive enactments *in pari materia*. Endlich, on Inter. of Sts. sec. 40, and cases there cited.

It is an established rule in the exposition of statutes, says Chancellor Kent, "that the intention of the lawgiver is to be deduced from a view of the whole, and of every part of a statute, taken and compared together. The real intention, when accurately ascertained, will always prevail over the literal sense of the terms. When the expression in a statute is special or particular, but the reason is general, the expression should be deemed general. *Scire leges, non hoc est verba earum tenere sed vim ac potestatem*, and the reason and intention of the lawgiver will control the strict letter of the law, when the latter would lead to palpable injustice, contradiction, and absurdity." 1 Kent Com. 461–'2. And as illustrative of this principle of construction, it is stated by the same learned author, that a saving clause in a statute will be rejected, when it is directly repugnant to the purview or body of the act, and could not stand without rendering the act inconsistent and destructive of itself. *Ib.*

And so it is an established rule, that where words are obscure or doubtful, the intention of the legislature is to be resorted to in order to find the meaning of the words as employed in the statute. A thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute, is not within the statute unless it be within the intention of the makers of it. *People vs. Utica Ins. Co.*, 15 John., 358, 380. And so therefore, that which is within the letter of the statute, may sometimes not be within the statute, not being within the intention of the makers. "If laws and statutes seem contrary to one another, yet if by interpretation they may stand together, they shall stand;" and where two laws only so far disagree or differ, as that by any other construction they may both stand together, the rule that *Leges posteriores, priores contrarias abrogant*, does not apply, and the latter is no repeal of the former.

Roll. Rep. 90, 91; *2d Co. Rep.* 5, 6; *19th Vin. Abs.* 519, 525; *4 Gill & John.*, 152, *Canal Co. vs. Railroad Co.*

The rule is very clearly stated by Mr. Chief Justice Fuller, speaking for the Supreme Court, in the case of *Petri vs. Commercial Bank*, 142 U. S., 644, 650. In that case, he said: "The rule that every clause in a statute should have effect, and one portion should not be placed in antagonism to another, is well settled; and it is also held that it is the duty of the court to ascertain the meaning of the legislature from the words used and the subject-matter to which
51 the statute relates, and to restrain its operation within narrower limits than its words import, if the court is satisfied that the literal meaning of its language would extend to cases which the legislature never intended to include in it." See also case of *Bennier vs. Bennier*, 147 U. S. 246.

It is difficult to suppose that it was ever the intention of Congress, by the adoption of section 226 of the Code, to give the right of appeal to this court in all cases of appeal from justices of the peace to the supreme court of this District; even though the amount in controversy barely exceeded five dollars. Yet the words employed in the section, if taken literally, would seem to confer the right. Where the demand in controversy exceeds fifty and does not exceed three hundred dollars, the suit therefor- may be brought either before a justice of the peace or in the supreme court of the District, and if brought before a justice of the peace, the *defendant* may remove the case to the supreme court of the District by *certiorari* for trial in the first instance, or he may have a trial before the justice of the peace, from whose judgment either party may appeal to the supreme court of the District. If the case be removed into the supreme court by *certiorari*, and be there tried, and judgment rendered, then either party may appeal to this court. If the words in section 226, instead of being read as applying to appeals strictly as such from justices of the peace, be read as applying to final orders or judgments in any case heard on return of *certiorari* by or from a justice of the peace, the apparently conflicting provisions of sections 82 and 226 would be made to harmonize and be rendered consistent, the one with the other, and would consist throughout with the general scheme of the statute relating to civil actions brought before justices of the peace. And this, we think, is the fair and rational construction to be placed upon the terms employed in section 226; as thereby all the provisions of the Code relating to this subject are given full effect and operation, and none rendered null and
of non-effect, by reason of the apparent conflict between
52 sections 82 and 226, such as would be the case if the contention of the present appellant were sustained. We know that, in popular understanding, the proceeding by *certiorari* is regarded as in its nature an appellate proceeding, and in many jurisdictions it is made so in reality. Considering the entire subject, and all the provisions of the Code relating thereto, we think it a reasonable inference that the proceeding referred to in section 226, as originating with and coming from a justice of the peace into the Supreme Court for trial and judgment, is the proceeding authorized to be brought

therein by *certiorari*, and not technically an appeal. By this construction, effect is given to the provision incorporated in section 226, and section 82 is allowed to stand and have operation, whereby it is declared, in accordance with the pre-existing law, that "in no case appealed from a justice of the peace shall there be any further appeal from the judgment of the circuit court."

This being our conclusion, it follows that this appeal is improperly here, and it must therefore be dismissed; *and it is so ordered.*

Appeal dismissed.

53 DILLER B. GROFF *vs.* FRANCIS MILLER. } No. 1199.

(Filed October 15, 1902.)

Motion for rehearing on motion to dismiss appeal.

Mr. Chief Justice ALVEY delivered the opinion of the court:

There is a motion made in this case for rehearing on motion to dismiss appeal, and which is founded upon the recent act of Congress of June 30, 1902, providing various amendments to the District Code. By this amendatory act sections 81 and 82 of the Code are repealed, without substituting any other provisions in their stead; and it is supposed that this is a congressional construction of section 226 of the Code, to the effect that the right of appeal was intended to be secured to this court from the supreme court of the District from any final order or judgment in any case heard on appeal from a justice of the peace. In disposing of the motion to dismiss the appeal in this case, we so construed the apparently conflicting sections 82 and 226 of the Code as to give effect to both sections, as we were required to do by established canons of construction. The Code was adopted as an entirety, and as a single legislative act, and no one part or section of it could in reason be said to be the last expression of legislative will. If in the amendatory and repealing act, passed after the appeal was disposed of by this court, congressional construction is to be accepted as to the meaning originally intended by section 226, then the fact that it was deemed necessary to repeal section 82, in order to give force and effect to section 226, it would follow that while both sections remained unrepealed they neutralised and frustrated each other, and neither could be allowed effective operation. This would leave the law as it existed prior to the adoption of the Code in full force, that is to say without any effect-
54 ive statutory right of appeal to this court, in cases like the present; and that being the case, the appeal taken in this case could not be sustained. In any aspect, therefore, this appeal would have to be dismissed.

Motion for rehearing overruled.

55 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 39 inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals (together with a copy of the opinion of said court in Groff *vs.* Miller, No. 1199) in the case of James S. Barton Key, appellant, *vs.* William F. Roberts, No. 1220, October term, 1902, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 26th day of November, A. D. 1902.

Seal Court of Appeals, District of Columbia.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Supreme Court of the United States.

No. 13, Original.—October Term, 1902.

In re James S. Barton Key, Petitioner.

[April 27, 1903.]

Mr. Chief Justice Fuller delivered the opinion of the Court:

William F. Roberts brought an action against J. S. Barton Key and James P. Scott, in February, 1901, before a justice of the peace of the District of Columbia, and recovered judgment for $196.30, whereupon Key and Scott carried the case by appeal to the Supreme Court of the District of Columbia, giving an undertaking on appeal with the United States Fidelity and Guaranty Company as surety. The case was tried in the District Supreme Court and resulted in a judgment in favor of Scott and against Key and the Guaranty Company. From this judgment Key alone prosecuted an appeal to the Court of Appeals of the District of Columbia, without summons and severance or any equivalent. Roberts moved to dismiss on two grounds: (1) The want of parties, *Mason* v. *United States*, 136 U. S. 581; *Hardee* v. *Wilson*, 146 U. S. 179; (2) That the Court of Appeals had no jurisdiction on appeal from the judgment of the court below in such cases.

The Court of Appeals had held in *Groff* v. *Miller*, 30 Wash. Law Rep. 434, that such an appeal could not be maintained, and accordingly dismissed the appeal in this case on the second ground. Id 436. Key then applied to this court for leave to file a petition for mandamus requiring the Court of Appeals to reinstate the appeal and proceed to a hearing and determination of the same on the merits. Leave was granted, and due return has been made to a rule entered on the petition thereupon filed.

The case could not have been brought here on appeal or writ of error. Code Dist. Col. § 233. And no application for certiorari was made under § 234. Act of March 3, 1901, 31 Stat. c. 854.

The controversy in respect of appeals to the Court of Appeals from judgments in the Supreme Court of the District in cases appealed from justices of the peace, raised under sections 32 and 226 of the act of 1901, was not only disposed of by the Court of Appeals in *Groff* v. *Miller*, but determined by the repeal of section 32 by the act of June 30, 1902. 32 Stat. c. 1329.

The writ of mandamus cannot be used to perform the office of an appeal or writ of error, and does not lie to review a final judgment or decree

sustaining a plea to the jurisdiction, even if no appeal or writ of error is given by law. It is not granted in doubtful cases, or where there is another adequate remedy, and whether it shall go or not usually rests in the sound discretion of the court. If sometimes demandable *ex debito justitiæ*, it is certainly not on a record like this. *American Construction Company* v. *Jacksonville Railway Company*, 148 U. S. 379; *In re Rice, petitioner*, 155 U. S. 403; High on Extr. Remedies, 3d ed. § 9.

Tested by these well-settled principles, the rule must be discharged and the petition dismissed.

So ordered.

True copy.

Test:

Clerk Supreme Court, U. S.